TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 212.

FREDERICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED AUGUST 4, 1898.

(16,354.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1897.

1 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff, *vs.* FREDRICK W. SMITH, HERBERT H. LOGAN, SAMUEL Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Saminiego, and Sabino Otero, Defendants.	Complaint.

Plaintiff complains of the above-named defendants, and for cause of action alleges—

That the defendants Fredrick W. Smith, Mariano G. Saminiego, and Sabino Otero are all residents of the city of Tucson, county of Pima, in the Territory of Arizona; that the defendant Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, and William Christy are residents of the city of Phœnix, county of Maricopa, in the Territory of Arizona.

That the defendant Fredrick W. Smith was appointed by the President of the United States receiver of public monies at Tuc-
2 son, Arizona, by commission dated February 28th, 1887; that said Fredrick W. Smith accepted said appointment, and in consideration thereof and his acceptance of said office the said Fredrick W. Smith, as principal, and the other defendants herein named, as sureties, on the 7th day of March, A. D. 1888, made, executed, and delivered to the plaintiff herein their certain bond of writing obligatory, signed with their names and sealed with their seals, of which the following is a true copy:

"Know all men by these presents, that we, Fredrick W. Smith, of Tucson, Pima county, Arizona, as principal, and Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett and William Christy, all of Phœnix, Maricopa county, Arizona, and Mariano G. Saminiego and Sabino Otero, of Tucson, Pima Co., Ariz., as sureties, are held and firmly bound unto the United States of America in the full and just sum of thirty thousand dollars, lawful money of the United States; to be paid to the United States for which payment well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this 7 seventh day of March in the year of our Lord one thousand eight hundred and eighty-eight. The condition of the foregoing obligation is such, that whereas; the President of the United States has appointed the said Fredrick W. Smith to be receiver of public moneys at Tucson, Arizona, by commission dated February 28th, 1887, and said Fredrick W. Smith has accepted said appointment.

"Now, therefore, if the said Fredrick W. Smith shall, at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public monies and honestly account, without fraud or delay, for the same and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue."

3 FREDRICK W. SMITH. [SEAL.]

Signed, sealed, and delivered as to Fredrick W. Smith in presence of—

M. P. FREEMAN,
B. M. JACOBS,
Of Tucson, Ariz.

HERBERT H. LOGAN. [SEAL.]
SAMUEL FRANKLIN. [SEAL.]
LINCOLN FOWLER. [SEAL.]
WILLIAM J. MURPHY. [SEAL.]
HENRY E. KEMP. [SEAL.]
JERRY MILLAY. [SEAL.]
NATHAN A. MORFORD. [SEAL.]
WILLIAM D. FULWILER. [SEAL.]
EPHRIAM J. BENNETT. [SEAL.]
WILLIAM CHRISTY. [SEAL.]

Signed, sealed, and delivered by Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, and William Christy in our presence—

THOMAS W. HINE,
Phœnix, Ariz.
THOMAS F. WILSON,
Tucson, Ariz.
D. H. WALLACE,
Phœnix, Ariz.

MARINANO G. SAMINIEGO. [SEAL.]

Signed, sealed, and delivered in presence of—
THOMAS F. WILSON,
WM. J. OSBORN,
Of Tucson, Ariz.,
By MARINANO G. SAMINIEGO.

SABINO OTERO. [SEAL.]

Signed, sealed, and delivered in presence of—
THOMAS F. WILSON,
WILLIAM J. OSBORN,
Of Tucson, Ariz.,
By SABINO OTERO.

That before the execution and delivery of the bond hereinabove set forth, to wit, on the 11th day of April, 1887, the said Fredrick W. Smith took possession and entered upon the duties of said office as receiver of public monies at Tucson, Arizona, and was at the time of the execution of the bond aforesaid the duly appointed, qualified, and acting receiver of public monies at Tucson, Arizona, as aforesaid.

That the accounts of said Fredrick W. Smith as such receiver of public monies at Tucson, Arizona, were adjusted on the 11th day of April, A. D. 1890, by the proper accounting officers of the
4 United States, under the bond of said Fredrick W. Smith, receiver of public moneys at Tucson, Arizona, as aforesaid, and a balance of twenty-one thousand seven hundred and thirty dollars and twelve cents was by said accounting officers reported as due and was actually due to the United States from said defendant, Fredrick W. Smith, receiver of public moneys at Tucson, Arizona, as aforesaid.

That said defendant, Fredrick W. Smith, as well as all of the other defendants above named, have neglected and refused to and still neglect and refuse to pay said balance of twenty-one thousand seven hundred and thirty dollars and twelve cents due and owing and unpaid from said Fredrick W. Smith to the United States and so reported by the said adjusted account of said Fredrick W. Smith to be due plaintiff or any part thereof into the Treasury of the United States, although often requested so to do.

Wherefore plaintiff prays judgment against the defendants herein for the said sum of twenty-one thousand seven hundred and thirty dollars and twelve cents and interest, at the rate of six per cent. per annum, from the eleventh day of April, 1890, and for costs.

HARRY R. JEFFORDS,
United States Attorney for Arizona.

(Endorsed as follows:)

No. B–31. 1st judicial district court of Arizona Ty. U. S. of America *vs.* Fred. W. Smith *et al.*, def'ts. Complaint. Filed May 12, 1890. Brewster Cameron, clerk, by L. H. Manning, deputy clerk.

5 UNITED STATES OF AMERICA:

In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the district and circuit courts of the United States.)

UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH, HERBERT H. LOGAN, SAMUEL Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Saminiego, and Sabino Otero, Defendants. } Summons.

Action brought in the district court of the first judicial district, Territory of Arizona.

The United States of America, Territory of Arizona, sends greeting to Fredrick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Saminiego, and Sabino Otero:

6 You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the Territory of Arizona and answer the complaint filed with the clerk of this court, at Tucson, in said district (a copy of which complaint accompanies this summons), within ten days (exclusive of the day of service) after the service upon you of this summons if served in this county, but if served out of the county and within this district, then within twenty days; in all other cases, thirty days.

And you are hereby notified that if you fail to appear and answer the complaint as above required the plaintiff will take judgment by default against you and costs and disbursements in this behalf expended.

Given under my hand and the seal of said district court, at Tucson, this 13th day of May, 1890.

[SEAL.] BREWSTER CAMERON, *Clerk.*

OFFICE OF THE UNITED STATES MARSHAL }
For the Territory of Arizona, } ss:

I hereby certify that I received the within summons on the 14th day of May, A. D. 1890, and personally served the same, on the 15th day of May, A. D. 1890, on Herbert H. Logan; Henry E.
7 Kemp, W. D. Fulwiler, Ephriam J. Bennett, on the 16th day of May, A. D. 1890; on Lincoln Fowler, Jerry Millay, Sam-

uel Franklin, and N. A. Morford on the 17th day of May, A. D. 1890; on William Christy on the 20th day of May, A. D. 1890, being the defendants named in the summons, by delivering it and leaving with each of said defendants personally, in the county of Maricopa, a copy of said summons, together with a true and correct copy of the complaint in this action.

R. H. PAUL, *Marshal*,
By J. V. PAUL,
Deputy Marshal.

OFFICE OF THE UNITED STATES MARSHAL } *ss:*
For the Territory of Arizona, }

I hereby certify that I received the within summons on the 14th day of May, A. D. 1890, and personally served the same, on the 28th day of May, A. D. 1890, on Sabino Otero and Marinano G. Saminego, being the defendants named in the summons, by delivering it and leaving with each of said defendants personally, in the county of Pima, a copy of said summons.

R. H. PAUL, *Marshal*,
By J. V. PAUL, *Deputy.*

8 (Endorsements:) No. B-31. United States of America. District court, first judicial district, Territory of Arizona. United States, plaintiff, *vs.* Fredrick W. Smith, Herbert H. Logan, Samuel Franklin, *et al.*, defendants. Summons. Filed June 4, 1890. Brewster Cameron, clerk.

9 In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the district and circuit courts of the United States.)

THE UNITED STATES OF AMERICA, Plaintiff, *vs.* FREDRICK W. SMITH, W. J. MURPHY, SABINO Otero, M. G. Saminiego, Robert H. Logan, Henry E. Kemp, W. D. Fulwiler, Ephriam J. Bennett, Lincoln Fowler, Jerry Millay, Samuel Franklin, William Christy, and N. A. Morford, Defendants.	Demurrer and Answer.

Now comes the defendants, to wit, Sabino Otero, M. G. Saminiego, Robert H. Logan, Henry E. Kemp, W. D. Fulwiler, Ephriam J. Bennett, Lincoln Fowler, Jerry Millay, Samuel Franklin, William Christy, and N. A. Morford, and demur to plaintiff's complaint filed in the above-entitled action, and for cause of demurrer allege that said complaint does not state facts sufficient to constitute a cause of action against these defendants.

Wherefore said defendants demand judgment, etc.

And for answer to said complaint come defendants Sabino Otero

M. G. Saminiego, Robert H. Logan, Henry E. Kemp, W. D. Fulwiler, Ephriam J. Bennett, Lincoln Fowler, Jerry Millay, Samuel
10 Franklin, William Christy, and N. A. Morford, by their attorneys, and deny all and singular the allegations in plaintiff's complaint, and of this they put themselves upon the country.

Wherefore said defendants pray judgment, etc.

BARNES & MARTIN,
Attorneys for Defendants Sabino Otero, M. G. Saminiego, Robert H. Logan, Henry E. Kemp, W. D. Fulwiler, Ephriam J. Bennett, Lincoln Fowler, Jerry Millay, Samuel Franklin, William Christy, and N. A. Morford.

(Endorsed as follows:)

No. B-31. In the district court, first judicial district, Arizona. United States of America *vs.* Fredr. W. Smith *et als.* Demurrer and answer of all defendants except defendants Smith and W. J. Murphy. Filed June 5, 1890, at 12 o'clock m. Brewster Cameron, clerk.

11 In the United States District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA
vs.
FREDRICK W. SMITH *et al.*

Comes now the plaintiff and demurs to the answer filed by the defendant- herein, and for cause of demurrer says that the same does not state facts sufficient to constitute a defence.

Second. For the reason that no offset for counter-claim or recoupment is pleaded by said answer.

HARRY R. JEFFORDS,
United States Attorney for Arizona.

(Endorsed as follows:)

B-31. U. S. district court, 1st judicial district of Arizona. United States of America *v.* Fredrick W. Smith *et al.* Demurrer to answer. Harry R. Jeffords, U. S. att'y. Filed Nov. 11, 1890. Brewster Cameron, clerk.

12 UNITED STATES OF AMERICA:

In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the district and circuit courts of the United States.)

UNITED STATES OF AMERICA, Plaintiff, *vs.* FREDRICK W. SMITH, HERBERT H. LOGAN, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Samniego, and Sabino Otero, Defendants.	Alias Summons.

Action brought in the district court of the first judicial district, Territory of Arizona.

The United States of America, Territory of Arizona, sends greeting to Fredrick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Saminiego, and Sabino Otero:

13 You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the Territory of Arizona and answer the complaint filed with the clerk of this court, at Tucson, in said district (a copy of which complaint accompanies this summons), within ten days (exclusive of the day of service) after the service upon you of this summons, if served in this county; but if served out of the county and within this district, then within twenty days; in all other cases thirty days.

And you are hereby notified that if you fail to appear and answer the complaint, as above required, the plaintiff will take judgment by default against you and costs and disbursements in this behalf expended.

Given under my hand and the seal of said district court, at Tucson, this 3rd day of November, 1890.

BREWSTER CAMERON, *Clerk*,
By SANTIAGO ANISA, *Deputy Clerk*.

14 OFFICE OF THE UNITED STATES MARSHAL } ss:
For the Territory of Arizona, }

I hereby certify that I received the within summons on the 3rd day of November, A. D. 1890, and personally served the same on the 5 day of November, A. D. 1890, on William J. Murphy, being the

defendants named in the summons, by delivering it and leaving with said defendant personally, in the county of Maricopa, A. T., a copy of said summons, together with a true and correct copy of the complaint in this action.

R. H. PAUL, *Marshal*,
By J. V. PAUL,
Deputy Marshal.

(Endorsed as follows:)

No. B-31. United States of America. District court, first judicial district, Territory of Arizona. United States, plaintiff, *vs.* Fredrick W. Smith, Herbert H. Logan, Samuel Franklin, *et al.*, defendants. Alias summons. Filed November 19, 1890. Brewster Cameron, clerk, by S. Anisa, deputy clerk.

15 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Saminiego, and Sabino Otero, Defendants.

Now comes defendants served in the above-entitled action and demur to plaintiff's amended complaint herein, and for cause of demurrer allege:

I.

That the same does not state facts sufficient to constitute a cause of action against said defendants served.

Wherefore defendants served pray judgment, etc.

BARNES & MARTIN,
Attorneys for Defendants Served.

II.

And on the further ground that said amended complaint does not allege any breach of the condition of the alleged bond in said complaint set forth.

Wherefore defendants served pray judgment, etc.

BARNES & MARTIN,
Attorneys for Defendants Served.

16 (Endorsed as follows:)

No. B-31. In the district court, first judicial district, Arizona. United States *vs.* Fred. W. Smith *et al.* Demurrer to amend, comp. Filed Nov. 15, 1890. Brewster Cameron, clerk, by S. Anisa, deputy clerk.

17 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam G. Bennett, William J. Christy, Mariano G. Samienego, and Sabino Otero, Defendants.

Now comes the above-named defendants, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, and William Christy, and for this their amended answer to the complaint of the plaintiff herein by way of demurrer hereby demurres to the complaint of the plaintiff for the reason that said complaint does not state facts sufficient to constitute a cause of action against these defendants.

Wherefore these defendants pray judgment on their said demurrer that the plaintiff's said action be dismissed, and that these defendants do have and recover their costs and disbursements in this action.

18 These defendants, further answering the complaint of the plaintiff herein denies each and every allegation in said complaint contained except such as are hereinafter expressly admitted.

These defendants admit the residence of the defendants as alleged in the complaint; admits that the defendant Fredrick W. Smith was appointed receiver of public monies at Tucson, Arizona, by the President of the United States, by commission dated February 28th, 1887.

These defendants, further answering the complaint of the plaintiff herein, alleges that the defendant Fredrick W. Smith was on the 28th day of February, 1887, duly appointed the receiver of public monies at Tucson, Arizona, by the President of the United States; that the said Fredrick W. Smith accepted said appointment, and that in consideration of said appointment and his acceptance thereof the said Fredrick W. Smith, as principal, and divers other persons whose names to these defendants are unknown, as sureties, at or about the date last aforesaid made, executed, and delivered to the plaintiff, The United States, a good and sufficient bond for the faithful discharge of his duties as such receiver; that said bond was in due form of law and among other things conditioned that if the said Fredrick W. Smith should at all times during his holding and remaining in said office carefully discharge the duties thereof and faithfully disburse all pub-

19 lic monies and honestly account without fraud or delay for the same and for all public funds and property which shall or may come into his hands, then said bond to be void; otherwise to remain in full force and effect; that said bond was by the United States duly accepted and approved, and thereupon the

said Fredrick W. Smith duly entered upon the duties of his said office as such receiver; that said bond has been ever since the same was executed as aforesaid and is now in full force and virtue; that thereafter, to wit, on or about the 7th day of March, A. D. 1888, and while said bond above mentioned was in full force and virtue and while the said Fredrick W. Smith was duly and legally acting as receiver aforesaid and before the execution of the bond set out in the complaint herein the Interior Department did cause the bond set out in the complaint to be prepared and transmitted to the said Fredrick W. Smith and did require and demand of him that the same, with the conditions and for the sum therein specified, should be executed by him, the said Fredrick W. Smith, with sufficient sureties, before he would be permitted to remain longer in office as receiver of the public monies at Tucson, Arizona, as aforesaid, or to longer receive and pay and emoluments attached to and belonging to the office of receiver as aforesaid; that the conditions of the bond set out in the complaint are varient and largely in excess of the bonds prescribed by the statutes of the United States in such
20 cases made and provided, to wit, section 2236 of the Revised Statutes of the United States of 1878, and wholly different from the conditions and in amount required by said statute, and it varies and enlarges the duties and responsibilities of the said Fredrick W. Smith and his sureties, the defendants herein, and that the same was under color and pretense of said statute and under color of office required and extorted from the said Fredrick W. Smith and from these defendants as his sureties against the form, force, and effect of the said statute by the then Secretary of the Interior; that by reason thereof the said bond set out in the complaint was forcably and by threats of removal unlawfully and illegally obtained from the said Fredrick W. Smith and these defendants without consideration and was at the time the same was executed, as alleged in the complaint, ever since has been, and now is absolutely void.

These defendants, further answering the complaint of the plaintiff herein, alleges that heretofore, to wit, on or about the 1st day of November, 1889, the said Fredrick W. Smith was removed from the office of receiver of public monies at Tucson, Arizona, and thereupon the accounts of the said Fredrick W. Smith as such receiver of public monies at Tucson, Arizona, were adjusted by the proper accounting officers of the United States, and thereupon the said accounting officers of the United States found that there was nothing
21 due the United States from the said Fredrick W. Smith, as such receiver or as disbursing agent of the United States, and said accounting officers so reported the same to the United States and to these defendants, and that in truth and in fact the said Fredrick W. Smith was not at the date of his removal as aforesaid indebted to the United States as receiver or disbursing officer in any sum whatever, and was not at the time of the commencement of this action indebted to the United States in any sum whatever; that the pretended balance of twenty-one thousand seven hundred and thirty dollars and twelve cents alleged in the complaint of the plaintiff to have been found due the plaintiff from the said Fredrick W. Smith,

as receiver and disbursing officer as aforesaid, were not on the 11th day of April, 1890, nor at any other time, adjusted by the proper accounting officers of the plaintiff or reported as due from the said Fredrick W. Smith, as receiver or disbursing officer as aforesaid, to the United States; that in truth and in fact, as these defendants are informed, and believes the same to be true, *that* the amount for which this action is brought was not entered on the books of the receiver's office at Tucson or elsewhere, or said amount or any portion thereof ever charged or attempted to be charged to the account of the said Fredrick W. Smith, as receiver or disbursing officer as aforesaid, until long after the 30th day of April, 1890; that

22 in pursuance of an order signed by W. M. Stone, Assistant Commissioner of the Land Office, dated at Washington, D. C., April 30th, 1890, and addressed to the register and receiver, Tucson, Arizona, instructing them in substance to change the law and rules of the Land Department heretofore adopted "holding that monies paid to a receiver of public monies before an entry had been allowed by the register and a certificate given are not paid to him as receiver but as a private person," they were instructed to examine persons claiming to have paid monies to the said Fredrick W. Smith for the purpose of making entries or proofs, having them, the persons, furnish affidavits, properly attested, showing that they did pay money to the said Fredrick W. Smith, and that the receiver enter upon the books of his office, under the account of Fredrick W. Smith, late receiver, the amount of purchase-money received for each class of entry; said purchase-money is to be charged to Fredrick W. Smith, the late receiver, for them to then prepare an account current, from 4–105 thereof, and certify therein that the transaction reported appears from the records of their office; that in accordance with the above instructions the accounts were made up and certified to for the amount set out in the complaint; that each and all of said sums composing said amount were illegally and unlawfully charged to the account of the said Fredrick W. Smith, late receiver, and are not legal charges against him as receiver or disbursing officer.

23 That these defendants, further answering the complaint of the plaintiff, allege that at the time of the removal of the said Fredrick W. Smith, as aforesaid, and the adjustment of his accounts at that time by the proper adjusting officers of the United States there was in the possession of these defendants the sum of twenty-five thousand dollars of the money and property of the said Fredrick W. Smith, out of which these defendants, as sureties on the bond set out in the complaint, could have paid the United States the amount it now claims as due from the said Fredrick W. Smith as receiver and disbursing officer, as aforesaid; that these defendants, being informed by the United States through its proper officers, that there was nothing due the plaintiff, The United States, from the said Fredrick W. Smith as receiver or disbursing agent of the United States, as aforesaid, and these defendants, believing and relying on the statements of the proper officers of the United States that there was nothing due the United States from the said

Fredrick W. Smith, these defendants paid out all of said twenty-five thousand dollars aforesaid to various and divers persons, none of said monies being paid to this plaintiff at the request of the said Fredrick W. Smith on his private and individual account; that the said Fredrick W. Smith is and was at the time of the commencement of this action insolvent and wholly irresponsible
24 and nothing whatever can be collected of him. These defendants, further answering the complaint of the plaintiff herein, allege that after the amount set out in the complaint was ascertained, in the manner hereinbefore stated, the United States had in its possession and under its control the sum of about seventeen hundred dollars in money, the property of the said Fredrick W. Smith; that these defendants requested the plaintiff, The United States, to withhold said amount and apply the same on any indebtedness that might be found due the United States from the said Fredrick W. Smith; that the plaintiff refused to withhold said amount or any part thereof for the purpose of applying the same as aforesaid, it well knowing *that* the said Fredrick W. Smith to be insolvent and wholly irresponsible.

Wherefore these defendants pray judgment that the plaintiff take nothing by its said action and that these defendants be adjudged to be absolutely freed from any liability whatever on the bond set out in the complaint, and that these defendants do have and recover of the plaintiff their costs and disbursements by them incurred in their defense herein, and for such other or further relief as may be just.

WM. H. BARNES AND
C. F. AINSWORTH,
Attorneys for These Defendants.

(Endorsements:) In the district court of the first judicial district of the Territory of Arizona. The United States, plaintiff, *vs.* Fredrick W. Smith *et al.*, defendants. Amended answer. Copy.

25 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff, *vs.* FREDRICK W. SMITH, HERBERT H. LOGAN, SAMUEL Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Samaniego, and Sabino Otero, Defendants.	Answer.

Now comes the above-named defendant, William J. Murphy, and for answer to the complaint of the plaintiff herein, by way of demurrer, he hereby demurs to the complaint of the plaintiff for the reason that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore this defendant prays judgment on his demurrer that

plaintiff's said action be dismissed, and that this defendant do have and recover his costs and disbursements in this action.

This defendant, further answering the complaint of the plaintiff herein, denies each and every allegation in said complaint
26 contained except such as hereinafter expressly admitted.

This defendant, further answering the complaint herein, admits that the defendant Fredrick W. Smith was appointed the United States receiver of public moneys at Tucson, Arizona, admits that this defendant signed the official bond of the said Smith as such receiver as his surety thereon, but denies that the bond by him so signed was in form the bond set out in the plaintiff's complaint herein.

This defendant, further answering the complaint of the plaintiff herein, alleges that heretofore, to wit, on or about the first day of November, A. D. 1889, the said Fredrick W. Smith was removed as such receiver of public moneys at Tucson, Arizona, and thereupon the accounts of said Fredrick W. Smith, as such receiver of public moneys at Tucson, Arizona, were adjusted by the proper accountimg officers of The United States, the plaintiff in this action, under the bond of the said Fredrick W. Smith, as such receiver of public moneys at Tucson, Arizona, as aforesaid, and thereupon the said accounting officers of the United States found that there was nothing due the United States from the said Fredrick W. Smith as such receiver or as disbursing agent for the United States, and said accounting officers of the United States aforesaid so reported the same to the United States and this defendant and the other sureties on the said Fredrick W. Smith's official bond as such receiver aforesaid.

27 That at the time of the removal of the said Fredrick W. Smith as aforesaid and the adjustment of his accounts as such receiver of public moneys at Tucson, Arizona, by the proper accounting officers of the United States as aforesaid there was in the possession of the defendants, the sureties on his official bond, the sum of twenty-five thousand dollars, the money and property of the said Fredrick W. Smith, out of which these defendants, the sureties on his official bond, could have paid the plaintiff, The United States, the amount it now claims as due from said defendant, Fredrick W. Smith, as receiver of public moneys at Tucson, Arizona, by its complaint herein; that these defendants being informed by the United States, through its proper adjusting officer, that there was nothing due the United States from the said Fredrick W. Smith as receiver or disbursing officer aforesaid, and these defendants believing and relying on said statements and reports of the plaintiff's proper adjusting officer as true that there was nothing due the United States from the said Fredrick W. Smith as such receiver or disbursing officer as aforesaid, these defendants, as sureties aforesaid, paid out all of said twenty-five thousand dollars aforesaid to various and divers persons, none of which was the plaintiff in this action, at the request of the said Fredrick W. Smith, on his private and individual account; that the said

Fredrick W. Smith is and was at the time of the commence-
28 ment of this action insolvent and wholly irresponsible, and nothing whatever can now or at the time of the commencement of this action be collected of him.

That after the plaintiff discovered the alleged deficiency in the said Fredrick W. Smith's accounts, as set out in *their* complaint herein, it, the United States, had in its possession and under its control the sum of about seventeen hundred dollars in money, the property of the said Fredrick W. Smith, and that these defendants requested the United States to withhold said amount and apply the same on the indebtedness described in plaintiff's complaint herein as due from said Fredrick W. Smith to the United States; that the United States refused to withhold said amount or any part thereof for the purpose of applying the same on said indebtedness, but paid the same over to the order of the said Fredrick W. Smith, knowing him to be insolvent and wholly irresponsible.

Wherefore this defendant prays judgment that the plaintiff take nothing by its said action, and that the same be dismissed, and that this defendant do have and recover of the plaintiff his costs and disbursements by him incurred and expended in his defense herein, and for such other or further relief as may be just.

W. H. BARNES,
J. H. MARTIN,
C. F. AINSWORTH,
Att'y for Defendant William J. Murphy.

29 (Endorsed as follows:)

B.–31. In the district court of the first judicial district, Arizona Territory. United States of America, pl'ff, *vs.* Fredrick W. Smith, William J. Murphy, *et al.*, defendants. Answer of William J. Murphy. Filed Nov. 28, 1890. Brewster Cameron, clerk. C. F. Ainsworth, att'y for def't.

30 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Marinano G. Saminiego, and Sabino Otero, Defendants.

Plaintiff complains of the above-named defendants, and for cause of action alleges—

That the defendants Fredrick W. Smith, Marinano G. Saminiego, and Sabino Otero are all residents of the city of Tucson, county of Pima, in the Territory of Arizona; that the defendants Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, and William Christy are residents of the city of Phœnix, county of Maricopa, in the Territory of Arizona.

That the defendant Fredrick W. Smith was appointed by the

President of the United States receiver of public monies at Tuc-
31 son, Arizona, by commission dated February 28th, 1887; that said Fredrick W. Smith accepted said appointment, and in consideration thereof and his acceptance of said office the said Fredrick W. Smith, as principal, and the other defendants herein named, as sureties, on the 7th day of March, A. D. 1888, made, executed, and delivered to the plaintiff herein their certain bond or writing obligatory, signed with their names and sealed with their seals, of which the following is a true copy:

"Know all men by these presents, that we, Fredrick W. Smith, of Tucson, Pima county, Arizona, as principal, and Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett and William Christy, all of Phœnix, Maricopa county, Arizona; and Marinano G. Saminiego and Sabino Otero, of Tucson, Pima county, Arizona, ar- held and firmly bound unto the United States of America in the full and just sum of thirty thousand dollars, lawful money of the United States, to be paid to the United States; for which payment well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors and administrators, jointly and severally firmly by these presents. Signed with our hands and sealed with our seals this seventh day of March in the year of our Lord one thousand eight hundred and eighty-eight. The condition of the foregoing obligation is such, that whereas; the President of the United States has appointed the said Fredrick W. Smith to be receiver of public monies at Tucson, Arizona, by commission dated February 29th, 1887, and said Fredrick W. Smith has accepted said appointment,

"Now therefore, if the said Fredrick W. Smith shall, at all times during his holding and remaining in said office, carefully discharge the duties thereof and faithfully disburse all public monies and honestly account without fraud or delay, for the same and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue."

32 FREDRICK W. SMITH. [SEAL.]

Signed, sealed, and delivered as to Fredrick W. Smith in presence of—

M. P. FREEMAN,
B. M. JACOBS,
Of Tucson, Arizona.

HERBERT H. LOGAN. [SEAL.]
SAMUEL FRANKLIN. [SEAL.]
LINCOLN FOWLER. [SEAL.]
WILLIAM J. MURPHY. [SEAL.]
HENRY E. KEMP. [SEAL.]
JERRY MILLAY. [SEAL.]
NATHAN A. MORFORD. [SEAL.]
WILLIAM D. FULWILER. [SEAL.]
EPHRIAM J. BENNETT. [SEAL.]
WILLIAM CHRISTY. [SEAL.]

Signed, sealed, and delivered by Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, and William Christy in our presence—

THOMAS W. HINE,
Phœnix, Ariz.
THOMAS F. WILSON,
Tucson, Ariz.
D. H. WALLACE,
Phœnix, Ariz.

MARINANO G. SAMINIEGO. [SEAL.]

Signed, sealed, and delivered in presence of—
THOMAS WILSON,
WM. J. OSBORN,
Of Tucson, Ariz.,
By MARINANO G. SAMINIEGO.

SABINO OTERO. [SEAL.]

Signed, sealed, and delivered in presence of—
THOMAS F. WILSON,
WILLIAM J. OSBORN,
Of Tucson, Ariz.,
By SABINO OTERO.

That before the execution and delivery of the bond hereinabove set forth, to wit, on the 11th day of April, 1887, the said Fredrick W. Smith took possession and entered upon the duties of said office as receiver of public monies at Tucson, Arizona, and was at the time of the execution of the bond aforesaid the duly appointed, qualified, and acting receiver of public monies at Tucson, Arizona, as aforesaid.

That the account- of said Fredrick W. Smith as such receiver of public monies at Tucson, Arizona, were adjusted on the 11th day of April, A. D. 1890, by the proper accounting officers of the
33 United States, under the bond of said Fredrick W. Smith, receiver of public moneys at Tucson, Arizona, aforesaid, and a balance of twenty-five thousand four hundred and sixty-eight dollars and ninety-six cents was by said accounting officers reported as due and said sum was actually due to the United States from said defendant, Fredrick W. Smith, receiver of public moneys at Tucson, Arizona, and was received by him to and for the use of the United States as aforesaid and was the money of the United States.

That said defendant, Fredrick W. Smith, as well as all of the other defendants above named, have neglected and refused and still neglect and refuse to pay said balance of twenty-five thousand four hundred and sixty-eight dollars and ninety-six cents due and owing and unpaid from said Fredrick W. Smith to the United States and so reported by the said adjusted account on said Fredrick W. Smith to be due plaintiff, or any part thereof, into the Treasury of the United States, although often requested so to do.

Wherefore plaintiff prays judgment against the defendants herein for the said sum of twenty-five thousand four hundred and sixty-eight dollars and ninety-six cents and interest, at the rate of six per cent. per annum, from the eleventh day of April, 1890, and for costs.

HARRY R. JEFFORDS,
United States Attorney for Arizona.

34 (Endorsed as follows:)

B–31. In the district court of the first judicial district of Arizona. United States *vs.* Fredrick W. Smith *et al.* Amended complaint. Service by copy rec'd this 11th day of February, 1891. W. H. Barnes & C. F. Ainsworth, att'ys for def'ts. Filed Feb. 11, 1891. Brewster Cameron, clerk, by Charles Bowman, deputy.

35 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, William Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Marianno G. Saminiego, and Sabino Otero, Defendants.

Now comes the plaintiff — moves to strike out of plaintiff's amended answer filed herein the following parts of said answer: From the word "and," in line 31, page 1, to "W. S.," both inclusive; all of page 2; lines one to 9 of page three, both inclusive; strike everything after the word "states," in line 32, page 3, to and including the word "complaint," in line 22, page 4; strike out everything after line 23 on page 4; also lines 1 to 22, both inclusive, on the ground that all of said matter is irrelevant, redundent, impertinent, and immaterial.

HARRY R. JEFFORDS,
United States Att'y for Arizona.

36 (Endorsed as follows:)

B–31. In the dist. court of the first judicial dist. of Arizona. United States *vs.* Fred. W. Smith *et al.* Motion to strike out. Filed Feb. 11, 1891. Brewster Cameron, clerk, by Charles Bowman, deputy cl'k.

37 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William J. Christy, Marinano G. Saminiego, and Sabino Otero, Defendants.

Plaintiff complains of the above-named defendants, and for cause of action alleges—

That the defendants Fredrick W. Smith, Marinano G. Saminiego, and Sabino Otero are all residents of the city of Tucson, county of Pima, in the Territory of Arizona; that the defendants Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, and William Christy are residents of the city of Phœnix, county of Maricopa, in the Territory of Arizona.

That the defendant Fredrick W. Smith was appointed by the President of the United States receiver of public monies at Tucson,
38 Arizona, by commission dated February 28th, 1887; that said Fredrick W. Smith accepted said appointment, and entered upon the duties of said office on the — day of ——, 1887; that on the 16th day of February, 1888, the President increased the penalty of said Fredrick W. Smith's bond, as receiver as aforesaid, to the sum of thirty thousand dollars; whereupon the said Fredrick W. Smith, as principal, and the other defendants herein named, as sureties, on the 7th day of March, A. D. 1888, made, executed, and delivered to the plaintiff herein their certain bond or writing obligatory, signed with their names and sealed with their seals, of which the following is a true copy:

"Know all men by these presents, that we, Fredrick W. Smith, of Tucson, Pima county, Arizona, as principal, and Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett and William Christy, all of Phœnix, Maricopa county, Arizona; and Marinano G. Saminiego and Sabino Otero, of Tucson, Pima county, Arizona, are held and firmly bound unto the United States of America in the full and just sum of thirty thousand dollars lawful money of the United States to be paid to the United States, for which payment well and truly to be made we bind ourselves and each of us and each of our heirs, executors and administrators jointly and severally firmly by these presents. Signed with our hands and sealed with our seals this seventh day of March in the year of our Lord one thousand eight hundred and eighty-eight.

"The condition of the foregoing obligation is such that, whereas the President of the United States has appointed the said Fredrick W. Smith to be receiver of public monies at Tucson, Arizona, by

commission dated February 29th, 1887, and said Fredrick W. Smith has accepted said appointment.

"Now therefore if the said Fredrick W. Smith shall at all times during his holding and remaining in said office carefully discharge the duties thereof and faithfully disburse all public monies
39 and honestly account without fraud or delay for the same and for all public funds and property which shall or may come into his hands then the above obligation to be void and of no effect, otherwise to remain in full force and virtue."

FREDRICK W. SMITH. [SEAL.]

Signed, sealed, and delivered as to Fredrick W. Smith in presence of—

M. P. FREEMAN,
B. M. JACOBS,
Of Tucson, Arizona.

HERBERT H. LOGAN. [SEAL.]
SAMUEL FRANKLIN. [SEAL.]
LINCOLN FOWLER. [SEAL.]
WILLIAM J. MURPHY. [SEAL.]
HENRY E. KEMP. [SEAL.]
JERRY MILLAY. [SEAL.]
NATHAN A. MORFORD. [SEAL.]
WILLIAM D. FULWILER. [SEAL.]
EPHRIAM J. BENNETT. [SEAL.]
WILLIAM CHRISTY. [SEAL.]

Signed, sealed, and delivered by Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, and William Christy in our presence—

THOMAS W. HINE,
Phœnix, Ariz.
THOMAS F. WILSON,
Tucson, Ariz.
D. H. WALLACE,
Phœnix, Ariz.

MARINANO G. SAMINIEGO [SEAL.]

Signed, sealed, and delivered in presence of—
THOMAS WILSON AND
WM. J. OSBORN,
Of Tucson, Ariz.,
By MARINANO G. SAMINIEGO.

SABINO OTERO. [SEAL.]

Signed, sealed, and delivered in presence of—
THOMAS F. WILSON,
WM. J. OSBORN,
Of Tucson, Ariz.,
By SABINO OTERO.

That before the execution and delivery of the bond hereinabove set forth, to wit, on the eleventh day of April, 1887, the said Fredrick W. Smith took possession and entered upon the duties of said office as receiver of public monies at Tucson, Arizona, and was at the time of the execution of the bond aforesaid the duly appointed, qualified, and acting receiver of public monies at Tucson, Arizona, as aforesaid.

That the account- of said Fredrick W. Smith as such re-
40 ceiver of public monies at Tucson, Arizona, were adjusted on the eleventh day of April, A. D. 1890, by the proper accounting officers of the United States, under the bond of said Fredrick W. Smith, receiver of public monies at Tucson, Arizona, as aforesaid, and a balance of twenty-five thousand four hundred and sixty-eight dollars and ninety-six cents was by said accounting officers reported as due and said sum was actually due to the United States from said defendant, Fredrick W. Smith, receiver of public moneys at Tucson, Arizona, and was received by him to and for the use of the United States as aforesaid.

That said defendant, Fredrick W. Smith, as well as all of the other defendants above named, have neglected and refused and still neglect and refuse to pay said balance of twenty-five thousand four hundred and sixty-eight dollars and ninety-six cents due and owing and unpaid from said Fredrick W. Smith to the United States and so reported by the said adjusted account of said Fredrick W. Smith to be due plaintiff, or any part thereof, into the Treasury of the United States, although often requested so to do.

Wherefore plaintiff prays judgment against the defendants herein for the said sum of twenty-five thousand four hundred and sixty-eight dollars and ninety-six cents and interest, at the rate of six per cent. per annum, from the eleventh day of April, 1890, and for costs.

HARRY R. JEFFORDS,
United States Attorney for Arizona.

41 (Endorsed as follows:)

B–31. United States *vs.* F. W. Smith. Amended com-
plaint. Filed Feb. 13, 1891. Brewster Cameron, clerk.

In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES
vs.
F. W. SMITH *et al.*

Be it remembered that in the above-entitled action the jury duly elected, empanelled, and sworn to try the issue joined between the plaintiff and Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephraim J. Bennett, William Christy, Mariano G. Saminego, and Sabino Otero, the defendants served with process herein, returned into court a verdict in favor of the
42 plaintiff and against said defendants served with process, as aforesaid, for the sum of five thousand nine hundred and

thirty-four dollars and ninety-six cents, said jury having first heard the evidence in said case and the argument of counsel who appeared for plaintiff and defendants respectively, and the said jury having heard the instructions of the court before the rendition of said verdict. It is therefore considered, ordered, and adjudged by the court that the United States do have and recover from the said Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Saminego, and Sabino Otero the sum of five thousand nine hundred and thirty-four dollars and ninety-six cents, together with its costs, taxed by the clerk in the sum of $637.89, for which let execution issue.

Done in open court this eighteenth day of February, A. D. 1891.

RICHARD E. SLOAN, *Judge.*

43 UNITED STATES OF AMERICA, } ss:
Territory of Arizona, First Judicial District, }

I, Brewster Cameron, clerk of the district court of the first judicial district of the Territory of Arizona, do hereby certify the foregoing to be a true and correct copy of a judgment duly made and entered on the minutes of said district court in the above-entitled action and of the whole thereof.

Witness my hand and the seal of said court this 26th day of February, A. D. 1891.

[SEAL.] BREWSTER CAMERON, *Clerk.*

44 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff, *vs.* F. W. SMITH, H. H. LOGAN, *et al.*, Defendants. } B-31. Memorandum of Costs and Disbursements.

Disbursements.

Clerk's fees	$143 95
Witness' fees	218 70
Jurors' fees	144 00
Marshal's fees	131 24
Total	$637 89

TERRITORY OF ARIZONA, } ss:
County of Pima, }

H. R. Jeffords, U. S. attorney, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled
45 action, and as such is better informed relative to the above costs and disbursements therein than the plaintiff; that the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

HARRY R. JEFFORDS.

Subscribed and sworn to before me this 20th day of February, A. D. 1891.

BREWSTER CAMERON, *Clerk.*

(Endorsed as follows:)
No. B–31. District court, first judicial district. United States, plaintiff, *vs.* F. W. Smith *et als.*, defendants. Memorandum of costs and disbursements. Filed Feb'y 20, 1891. Brewster Cameron, clerk.

46 In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.)

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH *et als.*, Defendants.

It is ordered in this cause that the statement of facts be made up and signed and filed in vacation at any time not to exceed thirty days after the adjournment of this term of court.

RICHARD E. SLOAN,
Associate Justice Supreme Court and Judge of the 1st Judicial District.

47 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA
vs.
FREDRICK W. SMITH *et al.* } B–31.

The defendant- having heretofore filed herein *his* motion for a new trial, and the court, having heard the same and the arguments of respective counsel for and against said motion and being now fully advised in the premises, doth order that said motion be, and the same is hereby, denied; to which ruling of the court in denying said motion said defendants, by their attorneys, instantly except and give notice of an appeal to the supreme court of Arizona.

(Minute entry, March 2, 1891, Book "H," page 61.)

48 Know all men by these presents that we, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Saminego and Sabino Otero as principals and T. W. Hine and W. J. Evans as sureties residents of the Territory of Arizona are held and firmly bound unto the United States of America in the sum of eleven thousand eight hundred and sixty-eight ($11,868.00) dollars gold coin of the United States to be paid unto the said United

States of America; for the payment of which well and truly to be made we jointly and severally bind ourselves our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this — day of March A. D. one thousand eight hundred and ninety-one.

The condition of the above obligation is such that, whereas the above obligors Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Marinano Saminego and Sabino Otero have prayed for and been granted an appeal to the supreme court of the
49 Territory of Arizona in a certain cause wherein they are appellants and the said United States of America is appellee from the district court of the first judicial district of the Territory of Arizona, having and exercising concurrent jurisdiction with the circuit and district courts of the United States.

Now in case the said appellants shall prosecute said appeal with effect, and in case the judgment of the appellate court shall be against them that they shall perform its judgment, sentence or decree, and pay all such damages as may be awarded against them upon the appeal and all costs then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof we have hereunto signed our names and affixed our seals this — day of March A. D. 1891.

SAMUEL FRANKLIN.	[SEAL.]
M. G. SAMINEGO.	[SEAL.]
JERRY MILLAY.	[SEAL.]
N. A. MORFORD.	[SEAL.]
W. D. FULWILER.	[SEAL.]
E. J. BENNETT.	[SEAL.]
WILLIAM CHRISTY.	[SEAL.]
T. W. HINE.	[SEAL.]
J. W. EVANS.	[SEAL.]

50 TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

T. W. Hine and J. W. Evans, sureties on the foregoing bond, being severally duly sworn, each for himself deposes and says that he — at least worth the sum for which he has become surety on the foregoing bond over and above all his debts and liabilities and exclusive of property exempt from execution.

T. W. HINE.
J. W. EVANS.

Subscribed and sworn to before me this 16th day of March, A. D. 1891.

BREWSTER CAMERON,
Clerk of the District Court of the First Judicial District of the Territory of Arizona.

(Endorsed as follows:)

Fredrick W. Smith *et al.* Bond on appeal. Deposited with me for filing at Phœnix, Arizona, this 16th day of March, A. D. 1891. Brewster Cameron, clerk. Filed March 19, 1891. Brewster Cameron, clerk, by Charles Bowman, deputy clerk.

51 In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.)

UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH *et al.*, Defendants.

And now comes defendants and allege that there is manifest error in the record and proceedings herein, as follows:

1st. The court erred in overruling the motion for a new trial.

2nd. The verdict is contrary to the law of the case.

3rd. The verdict is not sustained by the evidence.

4th. The court erred in refusing to charge the jury as asked by the defendants.

5th. The court erred in charging the jury as was done.

6th. The court erred in admitting evidence over the objec-
52 tions of defendants, as appears in exceptions taken during the progress of the trial.

7th. The court erred in excluding proper evidence offered by defendants, as appears in exceptions taken during the progress of the trial.

8th. The court erred in permitting plaintiff to introduce improper evidence over objections of defendants, as appears in exceptions taken during the progress of the trial.

9th. On the trial plaintiffs offered in evidence certain transcripts from the Treasury Department, set out in the statement of facts, and defendants objected to the same as not being on their face transcripts from the books and proceedings from the Treasury Department, but mere balances struck from and copies of proceedings in the Land Department of the Government, and the court overruled the objections and defendants excepted.

10th. On the trial defendants objected to all evidence as to final receipts issued by the receiver of the land office at Tucson under and by authority of letter in evidence, designated as letter "M;" all of which is fully set forth in the statement of facts; and the court overruled the objections and defendants excepted then and there.

BARNES & MARTIN,
Att'ys for Def'ts.

53 (Endorsed as follows:)

In the district court, first judicial district, Pima county, Arizona. United States *vs.* F. W. Smith *et al.* Assignment of errors. Filed March 2, 1891. Brewster Cameron, clerk.

54 In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.)

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
FREDRICK W. SMITH *et als.*, Defendants.

Be it remembered that after the verdict was rendered in said cause the defendants made their motion for a new trial on the 20th day of February, A. D. 1891, and filed the same in writing, and the same is in words and figures following, viz:

(Title of Court and Cause.)

"Now comes the defendants in the above-entitled action and move the court to set aside the verdict rendered herein and to grant defendants a new trial on the following grounds, viz:

"1st. The verdict is contrary to the law of the case.

"2nd. The verdict is not sustained by the evidence.

"3rd. The court erred in refusing to charge as asked by the defendants.

"4th. The court erred in charging the jury as was done.

55 "5th. The court erred in admitting evidence over the objections of defendants, as appears in exceptions taken during the progress of the trial.

"6th. The court erred in excluding proper evidence offered by defendants, as appears in exceptions taken during the progress of the trial.

"7th. The court erred in permitting plaintiff to introduce improper evidence over the objections of defendants, as appears in exceptions taken during the progress of the trial.

"C. F. AINSWORTH,
"BARNES & MARTIN, AND
"THOMAS A. BORTON,
"*Att'ys for Defendants.*"

And, the court having considered the same, the said motion was by the court overruled, and the defendants then and there excepted to the ruling of the court, and during the progress of the trial the defendants objected to evidence offered by plaintiff, as appears in the statement of facts, and the court overruled the objections and the defendants then and there excepted. The same are fully set out in the statement of facts and *is* hereby referred to to more fully set the same forth.

The defendants on their part offered evidence which was objected to by plaintiff, and the defendants then and there excepted to the ruling of the court; all of which is set forth in the statement of facts and referred to to specifically describe the same.

The court then, on request of the plaintiff, instructed the jury as follows:

56 The court instructs the jury that if you find from the evidence that any of the monies sued for in this action was paid to Fredrick W. Smith while receiver of the land office at Tucson, Arizona, by any person or persons to secure title to any of the public lands, and you further find from the evidence that the Government accepted such payment or payments to said Smith as a payment to it in consideration for the title to such lands and issued receipt or receipts for the same to said person or persons, then such monies as paid to said Smith while receiver as aforesaid became by the acceptance of the Government as a payment to it and by the issuance of said receipts public monies of the United States for which said Smith was bound to account *for* to the Government, and for which public monies, if unaccounted for, said Smith and the sureties on his bond are liable to the United States.

The court instructs the jury that if the jury believes from the evidence that Fredrick W. Smith, while acting as receiver of public monies of the land office at Tucson, Arizona, received any of the monies sued on in this case from persons seeking to secure title to a portion of the public lands on final receipt upon the entry said persons has been issued by the officers of the Government, then the money so received by the said Smith became public money, for which said Smith was bound to account *for* to the Government and for which money, if unaccounted for, said Smith and the sureties on his bond are liable to the United States.

57 The court further instructs the jury that neither McConnel, inspector of the General Land Office, nor Harlan, inspector of the General Land Office, could bind or estop the Government by any statement which they may have made to Wm. Christy as to any claim which the Government may have had against Fredrick W. Smith and the sureties on his official bond as receiver.

The court further instructs the jury that the President had the authority to increase the penalty of the bond of Fredrick W. Smith, receiver, to the sum of $30,000.00, and if from the evidence the jury believe that the President did order said bond increased to said sum of $30,000.00, then it makes no difference what the character of the letter written by the Commissioner of the General Land Office to said Smith notifying him of the increase of the penalty — said bond was, it was not extorted by the Department of the Interior or the Secretary thereof under color of office; and as a matter of law, the court charges the jury that the President acts through the heads of the departments of Government, and that the letter of the Secretary of the Interior notifying the Commissioner of the General Land Office of the increase of said Smith's bond was the act of the President.

(*Asked for by Plaintiff.*)

58 The court further instructs the jury that although Wm. Christy may have requested an inspector of the General Land Office to telegraph and stop payment on a Treasury draft

issued to Fredrick W. Smith, receiver, and although such inspector refused to so telegraph, and although said draft was afterward paid by the Government, it was no defense to this action if said draft was issued to said Smith not on his private account, but for the purpose of carrying out the duties of his said office.

(Refused.

R. E. SLOAN, *Judge.*)

And to each and every part of the same the defendants then and there excepted.

The defendants then requested the court to instruct the jury as follows:

(*Asked for by Def'ts.*)

The court instructs the jury that before the United States can charge these defendants with moneys claimed to be public money, in the hand- of Fred. W. Smith, not accounted for by him, the United States must have made demand on defendants for money so claimed; and if you find a demand was made on defendants, then the amount demanded is the limit of the amount of recovery.

(Refused.

R. E. SLOAN, *Judge.*)

The court instruct- the jury that if you find the U. S. Treasurer drew a draft on the assistant treasurer of the United States,
59 payable to Fred. W. Smith, in the absence of any evidence as to who it was paid *to*, the presumption is it was paid to the drawee, Smith, if it has been paid.

The court instructs the jury that this is a suit by the United States against Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, William Christy, Marinano G. Saminiego, and Sabino Otero, defendants, as sureties on the bond in evidence.

(Given.)

That the principal or said bond, Fred. W. Smith, has not been served with process in this case and is not a party to this suit.

That this is a suit to recover from defendants for public monies which it is alleged came into the hands of said Smith as receiver of public monies, as receiver of the United States land office at Tucson, Arizona.

(Given.)

That the burden of proof is on the Government to make out its case by evidence as to each item of public monies claimed and alleged to have been received by said Smith and not accounted for by him to the Government, by a preponderance of the evidence, before the jury can in this case allow any item as a charge against the defendants in this case.

(Given.)

That in determining the question as to whether any par-
60 ticular sum of money came into the hands of said Smith, as receiver, which was public monies in his hands, and that the same has not been accounted for by him, the jury should consider all the evidence in the case and determine the same; but unless a preponderence of the evidence shows that a particular sum was public money, and that it had not been accounted for, they should find for the defendants as to such item or sum of money.

(Given.)

That in considering whether any particular sum was public monies in his hands and unaccounted for the jury may consider the Treasury statements and memoranda therein contained, vouchers and statements bearing on the same, comparing the same one with the other and give to the same such weight and no more than the jury finds they deserve, and they should be considered, together with any other and all other evidence in the case bearing on the question.

The United States appears in court as any other litigant, with no more or larger rights than any other party to a cause.

The court further instructs you that the Government has no right to demand money of an entryman for lands entered by him under the several public land laws on account of the final receipt for lands until the final receipt is issued.

61 That the issuance of the final receipt by the receiver is the act by which the Government parts with its title, and until the United States parts with its title no money is due.

Hence money in the hands of a receiver before final proof is passed upon by the register and receiver, awaiting action on final proof, is not public money, but is in the hands of the receiver as a custodian of the entryman, for the entryman and for his convenience, and these defendants are not responsible upon the bond in evidence for any money so placed in the hands of the receiver before final proofs were passed and final receipt given to the entryman.

That the rules and regulations of the Department of the Interior, which has general charge of the disposition of the public lands, not in conflict with law are authorized by law to be made, and such rules and regulations have the force and effect of law, and if the jury find from the evidence in this case at the time of the execution of the bond in evidence and ever since, during the time said Smith held the office of receiver of public monies in the land office at Tucson, it was an established rule and regulation of the land office that any monies which might be in the hands of the receiver before final proof was passed on by the register and receiver could not be treated or considered as public moneys, and that the United States was in no way responsible therefor, and that the bondsmen of the receiver were not held responsible therefor, and that this was well
62 known and fully established, then the Government cannot change such rule and regulation, after a default to account for such moneys by the receiver, so as to thereby charge the defendants in this case on this bond.

(Refused.)

The court instructs the jury as to the item of $1,692 in the Treasury statements in evidence, if they find that the United States, by its Treasurer in Washington, drew a draft on the assistant treasurer of the United States in New York, payable to Fred. W. Smith, at sight, in October; that in December Smith went out of office as receiver, and that the said draft came to his hands after he went out of office; that demand was made on the defendants, bondsmen of said Smith, early in January to pay to the United States, by an agent of the United States, an amount of money in which was included the amount of said draft; that at the time said draft was not paid, and that defendant Christy then and there demanded that the United States do not pay said draft, but that the United States did afterward pay the amount of said draft to Fred. W. Smith, then that amount of money cannot be recovered in this case.

The court instructs the jury that if they find from the evidence in the case that the Commissioner of the General Land Office of the United States sent one Harlan to the office of the receiver of
63 public moneys at Tucson with directions that he take charge of the said office, and that he settle the accounts of the said Smith as receiver as aforesaid, and that he did under that authority take charge of the office and continued in charge until the same was turned over to Mr. Drake, successor of said Smith; that while he was so in charge of said office and while he was engaged in settling said accounts defendant Christy, on behalf of the defendants, as bondsmen of said Smith, demanded of said Harlan to know the amount of money due the United States by said Fred. W. Smith, and that he then had in his hands money of said Smith which he was authorized to pay the United States on account of any moneys due the Government in settlement of said accounts, and that he then and there informed said Harlan of said facts and offered to pay whatever was due the United States on said accounts and settle the same, and that said Harlan informed him that said Smith's accounts were all straight, and that said Smith did not owe the United States anything upon said accounts, and that, acting upon said information, he proceeded to pay out the money in his hands to the amount of about $25,000, upon the orders of said Smith, then the jury should consider such facts in determining the question whether the defendants are indebted in this case to the United States, giving to such evidence such weight as you think it deserves, together with the other evidence in the case.

64 The court instructs the jury that if the execution of the bond in evidence and sued on in this case was demanded in this case of Fred. W. Smith by the Commissioner of the General Land Office as the condition of his continuing to hold the office of receiver of the land office at Tucson and receiving the emoluments of said office; that it was in excess of the amount of the bond required of him by the President, then this bond is illegal and void and you should find for the defendants.

(Refused.

R. E. SLOAN, *Judge.*)

If the money for which this action is brought or any portion thereof was paid to Fredrick W. Smith prior to the date of the bond sued upon and the same remained in his hands until after he was removed from office as receiver, and after his removal the General Land Office, by letter "M," authorized the then receiver of the Tucson land office to examine the proofs on which moneys had been paid to Smith and allow the entries, then as to all such moneys these defendants are not liable on the bond sued upon in this action.

(Refused.

R. E. SLOAN, *Judge.*)

And the court gave those marked "given" and refused those marked "refused;" and to the refusing of the court to give the instructions requested the defendants then and there excepted.

65 On the trial the plaintiffs offered in evidence certain transcripts from the Treasury Department, set out in the statement of facts, and the defendants objected to the same as not being on their face transcripts of books and proceedings of the Treasury Department, but mere balances struck from and copies of proceedings in the Land Department of the Government; and the court overruled the objections and the defendants excepted.

On the trial defendants objected to all evidence as to final receipts issued by the receiver of the land office at Tucson, under and by authority of letter "X," in evidence, designated as letter "M;" all of which is fully set forth in the statement of facts; and the court overruled the objections and defendants excepted then and there.

And inasmuch as the matters and things above set forth are not of record in said cause, the same is signed and sealed and asked to be make a part of the record herein.

And it is done accordingly this 2nd day of March, A. D. 1891.

RICHARD E. SLOAN.
Associate Justice Supreme Court and
Judge of the First Judicial District.

(Endorsed as follows:)

No. B-31. In the district court, first judicial district, Pima county, Arizona. United States *vs.* F. W. Smith *et als.* Bill of exceptions. Filed March 3, 1891. Brewster Cameron, clerk. Barnes & Martin, attorneys-at-law, Tucson, Arizona.

66 In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and districts courts of the United States.)

I, Brewster Cameron, clerk of the district court aforesaid, do hereby certify the foregoing to be a full, true, and correct transcript of the records and papers in the case entitled "United States of America *vs.* Fredrick W. Smith *et als.*, No. B-31," now on file in my office.

And I further certify that the same was demanded by Wm. H. Barnes, Esq., on the 9th day of November, 1891, and was by me delivered to him on the 7th day of January, A. D. 1892.

In testimony whereof I have hereunto set my hand and affixed the official seal of my office this 7th day of January, A. D. 1892.

[SEAL.] BREWSTER CAMERON, *Clerk.*

67 (Endorsed as follows:)

No. 337. In supreme court, Territory of Arizona. Fredrick W. Smith *et al.*, appellants, *vs.* United States of America, appellee. Filed Jan. 11th, 1892. J. E. Walker clerk.

68 District Court, Arizona, First Judicial District.

UNITED STATES, Plaintiff,
vs.
FRED. W. SMITH *et al.*, Defendants. } Record.

Record of Proceedings in the Above-entitled Cause Had on Thursday, the 12th Day of February, 1891, Before the Court and Jury.

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Bryan W. Tichenor, stenographer and typist (court reporter, first judicial district), Tucson, Arizona.

References reported at legal rates without extra charge for stenographic service and transcript furnished daily if desired.

Attorney-at-law, notary public.

69 *Verification.*

TERRITORY OF ARIZONA, } ss:
County of Pima, }

B. W. Tichenor, being duly sworn according to law, on his oath deposeth and saith that he is the acting court reporter of the district court of the first judicial district of the Territory of Arizona; that as such he reported stenographically the proceedings had upon the

trial of the case of The United States of America, plaintiff, against Frederick W. Smith and others, defendants, at the time and place in the following record set forth; that the following record is a full, true, and correct transcript of his shorthand report of said trial, according to the best of deponent's skill, understanding, and belief.

(Signed) B. W. TICHENOR.

Subscribed and sworn to before me, at Tucson, Arizona, this 7th day of March, A. D. 1891.

(Signed) BREWSTER CAMERON,
Clerk of the District Court of the First Judicial District of the Territory of Arizona,
By CHARLES BOWMAN, *D. C.*

[Seal of District Court.]

70 *Statement of Facts in the Case of U. S. vs. Fred. W. Smith et als., with Exceptions Noted at the Trial, as Follows, viz:*

71 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA *vs.* FREDERICK W. SMITH, HERBERT H. LOGAN, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Samaniego, and Sabino Otero.	Suit on Bond of Fred. W. Smith as Receiver of Public Moneys at Tucson, Ariz.

Transcript of shorthand notes of evidence, etc., taken upon the trial of the above-entitled cause, at the court-room of said court, in the court-house, at Tucson, Pima county, Arizona Territory, on Thursday, the twelfth day of February, A. D. 1891, at the hour of 9 o'clock a. m., before the court (Hon. R. E. Sloan presiding) and jury and in the presence of Hon. H. R. Jeffords, U. S. attorney for Arizona, appearing for the Government, and of Messrs.

72 Barnes and Martin, C. F. Ainsworth, and Thos. A. Borton, Esqrs., appearing for all defendants except F. W. Smith (for whom no appearance was made, he not having been served with process herein).

Counsel for the Government moved the court to strike out certain portions of defendants' amended answer.

After argument, the motion was denied; to which ruling the Government, through its counsel, excepted.

(Recess until 1.30 p. m.)

After recess an adjournment was taken until tomorrow.

FRIDAY, *February 13th*—9 o'clock a. m.

Continuation of trial pursuant to adjournment.

Demurrer having been interposed herein to the amended answer, the court ruled upon the same as follows:

To the first demurrer. As to the sufficiency of the answer filed to state a general denial. Overruled.

To the second demurrer. As to special defense. Over-
73 ruled.

The third demurrer. As to third defense set up in amended answer. Overruled.

To which rulings of the court in overruling said demurrers the Government, by its counsel, excepted.

By Mr. JEFFORDS: May it please the court, we now ask leave to file a second amended complaint in this suit.

By the COURT: You may do so. That is your privilege; and if there is anything that requires an answer time will be given to the defendants to file an answer. In what does it change the amended complaint now on file?

By Mr. JEFFORDS: It simply sets up the additional fact that on the 16th day of February, 1888, the President ordered the penalty of the bond of the receiver increased.

By Mr. AINSWORTH: Our general denial would stand, of course, to that. We deny that he ever made any such order.

By the COURT: Oh, yes. You may now call a jury, Mr. Clerk.

74 The empaneling of the jury thereupon proceeded, without exception being taken by the defense, until—

E. B. VAN KUREN, a juror called into the box and sworn on his *voir dire*, testified as follows:

Examined by Mr. JEFFORDS:

Q. You heard the statement of the U. S. attorney?
A. I did.
Q. You are a citizen of the United States and of this Territory?
A. I am.
Q. And a resident of this the first judicial district?
A. Yes, sir.
Q. Do you know the parties to this action?
A. I know Mr. Smith and Mr. Samaniego and Mr. Otero.
Q. Have you any bias for or against any of the parties to this action?
A. No, sir; I have not.
Q. Do you know any of the facts connected with the transaction?
A. I don't know them to be facts; I heard something about it.
Q. Did you ever talk with any one who purported to know the facts?
A. Not to my knowledge.
Q. Did you ever read about it in the public journals?

A. I suppose I did, some, but I don't remember about it
75 particularly now.

Q. From what you heard or read did you form any opinion as to whether or not Major Smith or the sureties on his bond as receiver were liable to the Government for any moneys received by him as receiver, or have you expressed any such opinion?

A. Well, I never expressed any opinion; but I should judge he would be liable.

By the COURT: Don't state what your opinion is.

By the JUROR: No, sir; I never expressed any.

Q. Well, have you formed any opinion?

A. As to what?

Q. As to whether or not Fred. W. Smith or the sureties on his bond as receiver are liable to the Government for any moneys collected by Smith?

A. I haven't formed any opinion; no.

Q. Well, have you (interrupted)——

A. Only this much: if I received any money for any one, I am responsible to that extent; but I don't know whether he did receive money for the Government. I have no knowledge of it.

Q. Have you formed or expressed any opinion as to whether or not Smith *he* received any money for which he has not ac-
76 counted and which is due the Government?

A. No, sir; I know nothing about that. I have formed no opinion or expressed none.

Q. Have you formed or expressed any opinion as to whether or not Major Smith or the sureties on his bond as receiver are liable to the Government for any money at all?

A. No, sir; I have not, because I don't know anything about that part of it.

Q. You can try the case fairly and impartially under the evidence and the instructions of the court, can you?

A. Yes, air.

Q. Irrespective of anything you may have heard?

A. Yes.

By Mr. BARNES: We challenge him for the opinion expressed here in the presence of the jury.

By the COURT: Oh, no; the opinion is not upon the merits of the action. It was simply a general opinion as to the liability of one who receives money for another.

By Mr. BARNES: We will reserve the point and I will ask him a question or two.

Examined by Mr. BARNES:

Q. You say you have no opinion as to whether Mr. Smith
77 received any money at all for the Government?

A. No.

Q. But if it should appear that he did receive money as receiver, have you formed any opinion as to whether his bondsmen are liable in such case for the money?

A. Well, I don't know that I have particularly, any more than bondsmen are liable in any case. I don't know the conditions.

Q. You have not expressed any opinion except what you have expressed here?

A. No, sir; I have no right to.

Q. But you do express the opinion here that bondsmen ought to be liable for any money he received as receiver?

A. I should judge so, but I don't know anything about the law.

Q. Is that your opinion?

By Mr. JEFFORDS: We object.

By the COURT: Yes; I think that calls for his opinion as to matter of law. It is calling for an opinion on a general principle which we all recognize.

Q. Now, what do you say, judging your own mind fairly, do you know any reason why you could not try the case without re-
78 gard to any impression you may have had or anything you have heard, and try it simply by the evidence testified to here and under the instructions of the court—do you believe you could do that, and would you do it?

A. I should think I ought to.

Q. But the question is as to your mental condition, whether your mind is in that condition that you could try the case, disregarding all impressions you have had heretofore?

A. Yes, sir.

Q. You could do that?

A. Yes.

Q. And, of course, you would do it if you could?

A. Yes, sir.

By Mr. BARNES: Except the challenge we have made, we will not make any other.

By the COURT: It will be denied.

By Mr. BARNES: We save the point.

The empaneling of the jury was concluded without further exception, and with the usual admonition to the jury as provided by law (they having been first sworn to try the case), a recess was taken until 2 o'clock p. m.

79 (After recess.)

Mr. Jeffords read the complaint as amended.

Mr. Ainsworth read the answer as amended to meet the allegations of the amended complaint.

With the usual admonition to the jury, an adjournment was thereupon taken until tomorrow morning at 9 o'clock.

SATURDAY, *February* 14, 1891—9 o'clock a. m.

Continuation of trial pursuant to adjournment.

By Mr. JEFFORDS: I now offer in evidence, on behalf of the Government, certain Treasury transcripts showing the balance due the

Government upon the settlement of the accounts of Fred. W. Smith as receiver.

By Mr. BARNES: We have agreed with Mr. Jeffords as to a question of evidence, and it may as well be stated now, so that all of this may be considered in the light of that agreement, if it shall
80 become necessary in this case for the plaintiff to offer evidence of any witness that he has paid money to the receiver, or to Smith while he was receiver, we have agreed that secondary evidence may stand for the evidence of the witness, and that that may be such as is found in the transcripts or endorsements or memoranda or books in the register's office, such secondary evidence to stand for the evidence of the witness, and that we shall have the right to offer any evidence contradicting any item of that kind, and that we can reserve any objections to the materiality of it as we could if the witness was here swearing to it. We have made this stipulation to avoid the necessity of calling witnesses to prove these facts, and we expect to carry out that agreement. Having made this statement, we now object to this particular transcript (referring to one of the transcripts produced by Mr. Jeffords), and to the others offered, on the ground that they do not come within the section of the statute under which they are offered as evidence. This statute (reading same) makes that evidence which would not be evidence
81 without it; this statute makes nothing evidence except the books and proceedings of the Treasury Department, and does not make evidence out of immaterial data which may be on file in the Treasury Department and upon which that Department may have acted.

(Counsel continued his argument at length.)

By the COURT: If it comes properly authenticated by the Treasury Department it should be admitted in evidence and given such weight as the jury thinks fit. We must look to the certificate accompanying it to see whether it is a transcript of the books and proceedings of the department, and if so, it may be and must be under this statute allowed as competent evidence. Its weight and effect is a different thing altogether. It seems to comply with the requirements of the statute in that respect, and therefore the objection will be overruled and the transcript admitted.

By Mr. BARNES: We save the exception.

(Transcript marked "Pl'tiff's Ex. 'A,' U. S. *vs.* Smith *et al*," was then read.)

82 By Mr. JEFFORDS: We now offer this other document.

By Mr. BARNES: We make the same objection. The date upon which these officers certified to the Treasury Department is the evidence, and not the fact that it went into the Treasury Department.

By the COURT: The objection will be overruled as before.

By Mr. BARNES: We except.

(Transcript marked "Pl'tiff's Ex. 'B,' U. S. *vs.* Smith *et al.*," was then introduced.)

RICHARD J. HARTMAN, a witness called and sworn on behalf of the Government, testified as follows:

Direct examination.

(By Mr. JEFFORDS:)

Q. (Handing witness a document.) Look at this Ex. A and examine it. Examine the first item in that account (interrupted)——

By Mr. BARNES: We do not contest the fact that on certain dates the persons named in this document (Ex. A) paid the sums of money set down here to Fred. W. Smith while he was receiver. We
83 do not say or admit on what accounts they were paid.

Q. What is your name?
A. Richard J. Hartman.
Q. What official position, if any, do you hold?
A. Chief of the auditing division of the General Land Office.
Q. State whether or not you are familiar with the terms and abbreviations in use in the General Land Office and in the Interior Department.

By Mr. BARNES: That is immaterial, and we object.
By the COURT: Objection overruled.
By Mr. BARNES: We except.

A. I am.
Q. Will you look at the account before you (Ex. A) and state whether or not you can tell from that upon what accounts the sums of money set forth there were paid.

By Mr. AINSWORTH: We object to the form of the question; and it is also incompetent for the witness to testify to it.
By Mr. JEFFORDS: Of course, if he knows.

By Mr. BARNES:

Q. Did you know Fred. W. Smith?
A. No, sir.
Q. Were you here during the time he was in office?
A. No, sir.
Q. Have you any knowledge about how he conducted his
84 business here?
A. Nothing, except from his accounts and returns.
Q. That is all you know about it?
A. That is all.
Q. Do you know whether you ever saw an account that Fred. W. Smith returned, in your life?
A. Yes, sir.
Q. How do you know it?
A. By his signature to the account, sir.
Q. How do you know he signed it?
A. Well, by comparing the signature with the other records of the department.

Q. How do you know the signature in the other records of the department was — signature?

A. It was certified to by competent witnesses.

Q. And that's all you know about it?

A. Yes, sir; that is all.

By Mr. BARNES: I insist it is not competent evidence. The very things they call this witness here for are on file in the land office here in Tucson, and we want the originals here. We want to know the condition of the entries at the time this money was paid to Smith.

By Mr. JEFFORDS: There certainly is no disposition on the
85 party of the Government to treat the other side unfairly, and if they desire it the books of the Land Department in the office here will be brought into court; but here is an account where it is admitted the money was received at the dates specified by Smith and while he was receiver.

By the COURT (after argument): It seems to me we are getting away from the question. Suppose this witness to be an expert in book-keeping and here is a set of books introduced in evidence, would it not be competent to ask this witness what the meaning of certain signs used here was? The account is in evidence, and is it not competent to ask one who is familiar with this class of accounts to state what certain signs found here may be—what they mean?

By Mr. BARNES: They need no witness for that. We concede that "Hd." means homestead, and "P." means pre-emption, and "D. L. E." means desert land entry, and that the figures here indicate the number of the entry.

By Mr. JEFFORDS: Very well. Then I understand it is admitted that these moneys were paid to Smith while he was receiver, at the dates set forth here upon these accounts?

86 By Mr. BARNES: No; we do not admit the dates.

By the COURT: It seems to me the difference between you is the date of proof and the date of payment.

By Mr. BARNES: Exactly.

By the COURT: Is it admitted here that they were paid on behalf or for the purpose of making payments upon these proofs when made? In other words, is it admitted here to go to its full extent, what the applicant did and what he intended by the payment?

By Mr. BARNES: Not his intention; no, sir.

By Mr. AINSWORTH: We admit that the payments were made to Smith by individuals at a certain date and in certain sums, but we do not admit that they were paid at the dates set down there as the date of the final proof, because that was long after Smith went out of office and they could not have been paid then.

By Mr. BARNES: Our admission is that these transcripts shall have the same force as if the witnesses were here and testifying, but if the witness was here he could not testify to the condition his case was in when the money was paid.

87 By Mr. JEFFORDS: That is the agreement, that these moneys were paid to Smith and paid to him while receiver, and that the dates when they were paid were to be limited, and that they were paid for the purpose of securing public lands.

By Mr. BARNES: We do not admit that the cases had gone to final proof. We have made this admission to the full extent that Mr. Jeffords could have used the witnesses for, if here, who paid the money; no more, no less.

By the COURT: It would be competent for him to state that he sent the money in with his papers, whatever they were, as a payment upon his land.

By Mr. BARNES: If I was the entryman he could ask me if I paid Mr. Smith money; yes, sir, and that on the first day of March, or whatever the date was, that a homestead entry was then pending; that is all we admit, what the witness could testify to if he was here—all that would be competent for him to testify to.

By the COURT: The point you make is that the dates here are not correct?

88 By Mr. AINSWORTH: We do not say that they are not correct, but we do not concede them, that's all. We do not concede that the case had gone to final proof, as is stated here at the top of the page. We do not want, coupled with our admission, a statement of the condition of the case at the time.

By the COURT: You do not admit that final receipt issued?

By Mr. BARNES: No; we admit that the money was handed to him, and that he was then receiver.

By the COURT: You do not admit that on that date the land office here passed on the papers and issued final receipt. Do you admit that the final proof was taken?

By Mr. BARNES: We do not admit anything about final proof, because the witnesses, if here, could not swear to that; the papers would be the best evidence of that fact. We simply admit what the witness could swear to and no further.

By the COURT: As to the fact that he did make proof he could testify to that, I think.

89 By Mr. AINSWORTH: The papers themselves would be the evidence of the fact and not what he thought he did.

By Mr. JEFFORDS: He could testify to what he did, but the contents of the papers would have to be proven by the papers themselves. I shall ask leave to withdraw this witness for the present. I have sent for Mr. Brown, with the records of his office as register

(At this point a number of record books were brought into the court-room and placed near the witness box.)

DANIEL DRUMMOND, a witness called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. JEFFORDS:

Q. What is your name?
A. Daniel Drummond.
Q. Where do you reside?
A. Tucson.
Q. What is you occupation?

A. Clerk in the land office.

Q. Do you understand and are you familiar with the books kept in the land office at Tucson?

A. I am.

Q. Will you examine the books of the office before you and turn to desert land entry 792.

A. (Examining several books.) The book is not here.

90 Q. What book do you require?

A. I require the book that you asked me to turn to that entry in.

Q. Sir?

A. The book is not here with that desert land entry 792 in.

(At this stage of the proceedings more record books were brought into court.)

By the WITNESS (after examining several books): Yes, sir. I have it.

Q. In whose name is that entry, Mr. Drummond?

A. John Farson.

Q. When was it made?

A. 31st day of July, 1886.

Q. What was the date of the final proof?

A. Feb. 19, 1890.

Q. At what date was the final proof taken?

A. That we have no record of in the land office other than the papers, and they are not here.

Q. Well, what is that final date which you gave?

A. That is the date of the final receipt and certificate—the final receiver's receipt.

Q. The date when the final receipt was issued?

A Yes, sir.

Q. Who issued that receipt?

A. Charles R. Drake.

Q. Was there any money paid to Mr. Drake, do you know, at that time?

A. There was money paid to Mr. Drake.

91 Q. How much?

A. $320.

Q. Was that paid to Mr. Drake?

A. It was.

Q. By whom?

By Mr. BARNES: We object to any further examination on that item. If the Government got the money, that is all there is of it; we are not chargeable for it.

Q. Do you know of your own knowledge whether the money was paid to Mr. Drake on that receipt or not?

A. I judge simply from the custom of the office.

Q. Simply from the customs of the office?

A. Yes, sir.

Q. Any upon that point you do not know whether it was or not?
A. No, sir.
Q. Do you know the date the final proof reached the office?
A. I do not.
Q. Do you know whether it was made before Mr. Drake and Mr. Brown or not?
A. I do not.

By Mr. BARNES: Before you go to another item I will suggest whether it will not be handier after getting through with one item to cross-examine him on that *item* before going to another. I submit it as a matter of convenience. It will expedite matters.

92 By Mr. JEFFORDS: I have no objection to that course.

Q. Who made up the account you have there?
A. The register of the land office.
Q. The register, Herbert Brown?
A. Yes, sir.
Q. That is an abstract, then, of the account, is it?
A. No, sir; it is the book of original entry.

By Mr. JEFFORDS: You may cross-examine the witness on that item.

Cross-examined.

By Mr. BARNES:

Q. The entry you have spoken of is the desert-land entry of John Farson?
A. Yes, sir.
Q. 792?
A. Yes, sir.
Q. Final receipt issued when?
A. 19th of February, 1890.
Q. And I understand by the procedure of this office final receipt would not have issued if the money had not been paid?

By Mr. JEFFORD-: I object. I asked the witness if he knew anything about it of his own knowledge, and he said he did not.

By the COURT: He said he knew only from the custom of the office. It may have been a voluntary statement of the wit-
93 ness, but he stated that he knew it from the custom of the office. You may answer the question, if you know.
A. Only from the custom of the office.
Q. Well, was that the custom?
A. Yes, sir.
Q. Is not the officer prohibited by the rules of the department from issuing final receipt until he gets the money—the receiver?

By Mr. JEFFORDS: I object.
By the COURT: Objection sustained.

Q. Is it not the custom of the office to have the money when they issue the receipt?

By Mr. JEFFORDS: That is objected to as repetition.

A. Not always.

Q. Is it not the custom of the office to issue the final receipt upon the payment of the money after the proof has been passed upon?

By Mr. JEFFORDS: I object. This has been gone over.

By the COURT: If that is the only objection, the question may be answered again.

A. I say not always.

Q. I asked you what the custom of the office is.

A. Generally it is so.

Q. Yes.

94 By Mr. JEFFORDS: I object to that answer. Certainly a custom must be general—absolute.

Q. Must it not be money or land scrip or something which is authorized by law to take the place of money in the customs of the office?

By Mr. JEFFORDS: One moment. I object.

By the COURT: Objection sustained.

Q. I will ask you what the custom is. What is the custom about the money and the final receipt?

By Mr. JEFFORDS: That has all been gone over, and I object.

By the COURT: If that is the only objection, it may be answered.

By Mr. JEFFORDS: And, further, because it is irrelevant and immaterial, in that it does not meet any issue in this case, because it may have been the custom of the office and yet may not have been followed.

By the COURT: This examination is directed to a particular item, and it does not seem to me that the custom can throw any light upon this particular item. It is a question of fact, and if the witness does not know whether it was paid it does not seem to

95 me to be competent to show that it was in any particular way by showing the custom of the office.

By Mr. BARNES: No; except he says in answer to Mr. Jeffords, "Only by the custom of the office;" now I want to know what he meant by that.

By the COURT: I think he has answered that, whether or not the custom of the office was to pay the money at the time of the final receipt.

Q. Now, answer that.

By the COURT: I think he has answered it by saying, Generally, but not always.

Q. Now, what do you mean by "not always"?

By the COURT: You may answer that question.

A. This office is instructed to issue receipts without the payment of money in special cases.

By Mr. AINSWORTH:

Q. Subsequent to that entry since Fred. Smith went out of office?
A. Since this entry was made.

By Mr. BARNES (resuming):

Q. I am talking about the time and prior to the time of that entry and not what occurred since.

A. Prior to that entry (interrupted)——

96 Q. At that time and prior.

A. It is usually cash or some equivalent.

Q. You said "not always." What is the equivalent? What do you mean by that?

A. Well, land scrip; different series of scrip.

Q. That scrip can be accounted for as money, can't it?

A. Yes, sir.

By Mr. JEFFORDS: That I object to as a question of law.

By the COURT: Yes.

Q. Up to the time of the entry in that book there hadn't it been the universal custom of that office to issue the final receipt only upon receipt of the cash or equivalent equal to cash?

A. Generally, but (interrupted)——

By Mr. JEFFORDS: This is objected to as immaterial. This is an investigation of one particular item, and the only facts which should go before the jury are facts connected with the item itself in regard to that item and in elucidating that item.

By the COURT: Yes; I think so.

By Mr. BARNES: The main and only point is, Did the Government get the money? I want to know hos strong that custom

97 was, and I think we can show it was an unvarying custom.

By the COURT: It is a pure question of fact as to whether the Government got its money.

By Mr. BARNES: I want to show by him that the entries in that book mean that the money was paid to go to the jury.

By the COURT: Answer that question directly.

Q. Do or not the entries there of the date appearing there show that the money due the Government for that entry was paid?

By Mr. JEFFORDS: I object to that part of the question as to date.

Q. Well, leave out the date, then. Does it or does it not show that desert-land entry 792—that the money due to the Government on that entry has been paid? The entr*ied* on this book, I mean.

A. From the face of the book it shows that it has been paid.

By Mr. BARNES: That is all.

By Mr. JEFFORDS:

Q. To whom does it show it has been paid or by whom accounted for to the Government?

By Mr. BARNES: That is objected to. It was paid to
98 Charles R. Drake, and we are not trying him.

By the COURT: I do not suppose it could show that, possibly. The only entry there, as I understand it, is that on a certain date final receipt was issued upon the receipt of so much money.

Q. Do you know whether or not that money was paid to Charles R. Drake, as receiver of public moneys?

By Mr. BARNES: That is immaterial.

Q. Or whether or not it was paid to his predecessor in office?

By Mr. BARNES: That is objected to as immaterial. If the Government got its money, that is all there is of this item in this lawsuit. If it was paid to Mr. Drake, we cannot trace it any further.

By the COURT: Is the Government bound by an entry in that book? Cannot it be proven outside of that?

By Mr. JEFFORDS: We put this book in for the purpose of showing the dates, if we can, when these moneys were paid. The witness is testifying from the book, but the book is not offered in evidence yet.

By the COURT (after argument): Of course, it must be shown that the money was not received from the receiver by the Gov-
99 ernment, and I cannot see how the date in that book will tend to show that fact.

By Mr. JEFFORDS: I will attempt to solve this matter by withdrawing this witness and calling Mr. Drake.

CHARLES R. DRAKE, a witness called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. JEFFORDS:

Q. What is your full name?
A. Charles R. Drake.
Q. What position do you occupy?
A. Receiver of the land office.
Q. Here in Tucson?
A. Tucson.
Q. Whom did you succeed as receiver of the land office?
A. Frederick W. Smith.
Q. I will ask you, Mr. Drake, whether or not you ever received any money on desert-land entry 792 of John Farson?
A. 792?
Q. Yes, sir.
A. That is the final number of the entry.
Q. I think it is the original number, but I will ask you what is the date of the final proof taken in that case?
100 A. Well, I haven't my books; you have the register's books here.

By Mr. BARNES: I suppose you mean the date of the final receipt?

Q. The date of the final receipt and proof, yes.
A. Was that the final number?
Q. The original number. What is the final number?
A. (Referring to book). No. 223. The money has been received on that; it is entered up here.
Q. When was the final receipt issued?
A. February 19, 1890.
Q. Who received the money upon that entry?
A. I did; it was paid to me before this entry was put on.
Q. What was the date of the proof, Mr. Drake?

By Mr. BARNES: That is immaterial, so long as the Government got its money.

By the COURT: Yes; objection sustained.

Q. Now, take homestead entry No. 771—original number.

By Mr. BARNES: You ask no more about the entry of Farson?

By Mr. JEFFORDS: No; you may cross-examine him, if you wish.

101 Cross-examined.

By Mr. BARNES:

Q. Before going into another item I will show you this paper (exhibiting a document to the witness). Did you write that letter?
A. I did; that is correct.

By Mr. JEFFORDS: May I see it, please?

By Mr. BARNES: Certainly (handing same to Mr. Jeffords).

Q. It was money paid to you after that letter was written?
A. Yes, sir; money paid afterwards. I recognize that entry as one passed on after I went into office, for which the money was paid before, but which (interrupted)——
Q. We do not question that fact, but we do not ask about it.

By Mr. BARNES: We will offer this in connection with this entry.

By Mr. JEFFORDS: And we object to it as immaterial and irrelevant. It is about the same Farson entry that Mr. Drake has been asked about.

By the COURT: Mr. Drake has stated that he received the money, and this is immaterial.

By Mr. AINSWORTH: We think it material on a point which will develop later.

102 By the COURT: As to this item it is immaterial. It is admitted that the Government has received the money, and it seems to me that is sufficient.

By Mr. BARNES: We except.

Direct examination resumed:

Q. Turn to original desert entry No. 474, John Shoshusen.
A. I have it.

Q. Will you state when the final proof was made in that case?
A. Well, I can't tell about the date of final proof. The dates of the final proofs are on the proofs themselves. We keep no record of the date of making final proofs.
Q. What was the date of the final certificate?
A. Have you got the number of the final certificate there? This is the original here. That was one of those proofs that was passed on by authority of Commissioner's letter "M" of April 30th.

By Mr. BARNES:

Q. Have you that letter?
A. Yes, sir; it is here in court. I would have to go to the records to see the date it was put on final proof.

By Mr. BARNES: In connection with this answer we would like to have letter "M" put in evidence.

By Mr. JEFFORDS: You can ask for that when it comes to
103 the cross-examination

By the COURT: Proceed.

By the WITNESS: I don't find it here—the final proof of Shoshusen.
Q. Have you any book in your office which shows it?
A. Mr. Drummond, will you go over to the office and ascertain about that?

By Mr. JEFFORDS (resuming):

Q. Did you ever receive any money on that entry, Mr. Drake?
A. No, sir.
Q. Did you issue the final receipt?
A. I did.
Q. Under what authority?
A. Commissioner's letter "M" of date April 30, 1890.
Q. From whom received?
A. From the Commissioner of the General Land Office.

Further cross-examination by Mr. BARNES:

By Mr. BARNES: The witness has answered that final receipt was issued pursuant to the authority of letter "M;" can you produce letter "M" or a copy of it?
By Mr. JEFFORDS: I have letter "M" here in my hand (passing the same to Mr. Barnes).

104 Q. (Exhibiting paper.) Is this the original letter "M" you spoke of?
A. Yes, sir.

By Mr. JEFFORDS: I do not care about it at this time.
By Mr. BARNES: We draw it out in connection with this answer and will consider it as in. I do not care about delaying the examination now so long as it is considered in the case.
By the COURT: Very well; proceed.

(A copy of said letter "M" is hereto attached, marked "Exhibit A," and made a part hereof.)

Direct examination resumed:

Q. Turn to original homestead entry 781, Isador Asher.

A. That book is not in court, I think, Mr. Jeffords. This one only comes up to 1315; the book prior to this one is not here.

Q. We will use that for the present, then. Turn to declaratory statement 1706, W. B. Taylor.

A. Yes, sir.

Q. Final proof been made on that?

A. Have you the final proof number there?

Q. Well, has final proof been made on it?

A. Well, I can't say. These are the register's books; I do not keep this set of books. There are two sets of books kept in the Land Office, and you have here the register's books, and I keep the receiver's books. We passed something over four or five hun-
105 dred proofs and there is a similarity of names, and it would be impossible to say whether proof had been passed on them without looking at my own books. If you have the final proof number there I can turn to it very rapidly.

Q. Going back to the entry of John Farson, desert, 474, was that final proof in the office at the time you entered upon the duties of the office of receiver?

A. Yes, sir.

Q. Was the money with it?

A. No, sir; the proof was there.

Q. Was the money with it, I say?

A. No, sir—that is, the money hadn't been turned over to me.

Q. I was going to ask, Mr. Drake, if there were some books from which you could tell about this entry you were asked about, this Taylor entry, No. 1706.

A. Yes, sir; I could tell from my own books: I can see if I can find it here among the cash entries. I will look in Mr. Brown's books here and can tell from the date. What was the name?

Q. W. B. Taylor, declaratory statement No. 1706.

By the COURT: It seems to me you would save time if Mr. Drake would produce his own books.

106 By Mr. JEFFORDS: I have sent for them, may it please the court.

A. I don't find any evidence of that proof being entered up.

Q. Can you tell from the books whether it has been entered up or not?

A. If it has been entered up it ought to be entered as land sold here.

Q. Did you ever receive any money on that?

By Mr. BARNES: That is objected to as irrelevant and immaterial.

By the COURT: Oh, yes; it is immaterial, unless there is some record of final proof.

By Mr. JEFFORDS: Final proof may not have been made or entered up, but the money may have been received. It is admitted that the money was received, as far as that is concerned.

By the COURT: By Smith; and, as I understand it, the purpose of this evidence is to show it was received as payment for land of some kind.

By Mr. JEFFORDS: As I understand it, the admission is that the moneys were paid to Smith for the purpose of paying for a portion of the public lands.

107 By Mr. BARNES: The purpose could not be admitted, because the witness couldn't swear to it.

By the COURT: It must be shown that the Government parted with something, of course, before the money was due the Government. (After further argument): If these moneys were paid to Smith, as receiver, in advance of final proof, but if the Government takes that as payment and issues final receipt and parts with something, it seems to me that is a question the receiver or his bondsmen cannot raise against the Government; but in order to constitute it public moneys it must have been received for something and the Government part with something.

I do not apprehend that more money turned in voluntarily to the receiver for which the Government is not bound to issue final receipt or part with any land would be public money.

I think it is necessary for the Government to show that final receipt has issued or that the Government has accepted the payment to Smith as payment to them.

By Mr. BARNES: We will raise this question right now.

108 The statute says that the department may make rules and regulations governing the handling of money—public money. Now, a bond is given pursuant to statute; the statute then enters into the bond and is a part of the contract. When the statute says the department may make rules and regulations, and when made, they become part of the bond and enter into it as much as the law would. Now, letter M issued long after these bondsmen signed this bond and long after Smith ceased to be receiver. The rule and regulation of the department must have been unvarying and must have been a part of the contract; that final receipt should not pass until the Government got its money. Now the Government, after this defalcation takes place and after Smith has gone out of office, as letter M shows, makes a different ruling to apply to this case. Can that different ruling as applicable to this case be made the means of binding these bondsmen?

By the COURT (after argument): I agree with the general proposition that the law in force at the time of the execution of the

109 bond became a part of the bond, and the question is whether those rules and regulations have the force of law, whether the rules and regulations of the department after the date of the receiver's bond form part of the receiver's contract, and whether or not the bond is made with a view to this or simply the rules and regulations in force at the time of its execution, and any regulations made after that will bind the bondsmen. Is not the obliga-

tion made with a view that these rules may be changed by the department? These rules are regulations as to procedure, that is all; only that portion regulating the receipt of the money and the issuance of final receipt can in any way affect this. The only purpose for which it could be introduced, it seems to me, is to show that the Government has considered this as payment and has upon these payments to Smith issued final receipts.

(Recess until 2 o'clock p. m.), with usual admonition to the jury.

By the COURT (continuing): The objection arose upon the
110 materiality of the evidence as regards the issuing of final receipt. I think the Government must show that they have accepted it as payment and gone far enough to make it a completed transaction between the Government and the entryman. If it has become a completed transaction between the Government and the entryman, if they have accepted it as payment, it seems to me the sureties on the bond are liable, because by the plain transaction it has become public moneys, and the mere fact that it might have been paid in advance would be a matter which the sureties could not raise. It seems to me that it must have been a completed transaction between the Government and the entryman, and the issuance of final receipt would be payment by the entryman and acceptance by the Government, and the moment it was accepted it became public moneys. The objection coming as it does, I will overrule it on the question of final proof.

By Mr. JEFFORDS: We except.

Q. Turn to declaratory statement No. 2289, Renslow Crosby.

A. I have got it.

111 Q. What was the date of the issuance of the final receipt or certificate?

A. December 18, 1889.

Q. By whom was it issued?

A. The receipt?

Q. Yes, sir.

A. By me.

Q. Was any money paid to you on it?

A. Yes, sir.

Q. How much?

A. Two hundred dollars.

Q. Wasn't that one of the final receipts you issued under instructions of letter "M" without further payment?

A. That was one wherein the money was repaid.

Q. Repaid?

A. Paid the second time; yes.

By Mr. BARNES: We object to that. It was paid to them and that is sufficient. That does not come under letter M.

By Mr. AINSWORTH: We don't care to cross-examine on that. The Government has its money and that ends it.

Q. Declaratory statement 2146; turn to that, please?

A. I have it; Leo Franklinberg.
Q. Yes, sir. When was final receipt issued in that case?
A. Issued July 2, 1890, by authority of letter M, April 30.
Q. By whom issued?
A. The receipt was issued by myself.

By Mr. BARNES: We object to the statement that it was
112 issued by authority of letter M.

By the COURT: Yes; that portion of the answer will be stricken out as not responsive.

Q. Did you receive any money from that entry?
A. No, sir.
Q. Under what authority did you issue that receipt?

By Mr. BARNES: That is objected to as incompetent.

A. By the authority of the Commissioner under letter M.

By the COURT: I think that is material to go before the jury as a circumstance. The objection is overruled.
By Mr. BARNES: We save the point.

Q. Will you turn to desert land entry No. 1184?
A. Original?
Q. Yes; but before you turn to that I will ask you where the final proof was.
A. In what case?
Q. In this Franklinberg case, No. 2146. Was it taken by you or was it in the office when you succeeded Mr. Smith?
A. It was in the office when I went into the office, prior to my induction into office.

By Mr. BARNES:

Q. Had the final proof been passed on by the office?
A. No, sir.
Q. It was there as a pending matter?
A. Yes, sir.
113 Q. Undisposed of?
A. Yes, sir.

By Mr. AINSWORTH: You passed on it yourself?
A. The register and I did; yes, sir.

By Mr. BARNES:

Q. After Mr. Smith went out of office?
A. Yes, sir.
Q. Who was the register and receiver who passed on it?
A. Mr. Brown and myself.

Further direct examination by Mr. JEFFORDS:

Q. Now, original desert entry No. 1184, J. De Barth Shorb?
A. I have it; yes, sir.
Q. When was the final receipt issued in that case, if it was issued?
A. September 26, 1890.

Q. By whom was final receipt issued?
A. It was issued by myself.
Q. Was any money paid to you for the issuance of it?
A. No, sir; there was none.
Q. Under what authority did you issue it?

By Mr. BARNES: We raise the same point.
By the COURT: Yes; overruled.

A. By authority of the Commissioner of the General Land Office, letter M.

114 Q. Was the final proof taken after you went into office?
A. No, sir; prior to my going into office. The proof was in the office at the time I took charge of the office.
Q. Was there any money with the papers?
A. No money was ever received by me.
Q. On that account?
A. No, sir.
Q. Either from your predecessor or from the entryman?
A. No, sir.

Cross-examined by Mr. BARNES:

Q. Was that at the time you went into the office a pending and undisposed-of case?
A. Yes, sir; it was.
Q. And it was afterwards passed on by you and Mr. Brown, as register?
A. Yes, sir; there was a contest pending on that at the time we went into office, which was settled afterwards. No; the case was in the hands of the department; it had been reported up.
Q. But finally settled by you and Mr. Brown, as receiver and register?
A. Yes, sir.
Q. And then final proof issued?
A. Yes, sir; under authority of that letter M.

By Mr. AINSWORTH:

115 Q. What is the amount to be paid the Government on that entry? What was the Government entitled to receive on that entry?
A. $480.
Q. Is that the amount you have charged there at $1,280 in your list? You say $480 the Government was entitled to receive.
A. Yes, sir; that is the amount here. That might not have been the amount paid in on it.
Q. But that was the correct amount? That was the amount the Government was entitled to—the amount that was due?
A. Yes, sir.
Q. When contest is pending no final receipt issued from this office?
A. No, sir; not till the case is settled entirely.

By Mr. JEFFORDS, resuming:

Q. Mr. Drake, I will ask you if the final proof papers on file in the office at the time you took charge—whether or not they showed how much Mr. Smith had collected on this entry.

By Mr. BARNES: That is objected to. He may have collected sums beyond what the law allowed.

By the COURT: I apprehend all the bondsmen would be responsible for would be the amount legally due the Government.

By Mr. JEFFORDS: I withdraw the question. I think the
116 court and counsel are both right.

Q. Desert entry 366?

A. Original?

Q. Yes, sir; J. A. Lavaree.

A. John A. Lavoie.

Q. When was final receipt issued in that case?

A. I do not think it has been issued yet; I think that is one of the proofs that has not been passed on yet.

Q. Is it now in the office?

A. I think it is; yes, sir.

Q. Does it come under letter M?

By Mr. BARNES: That is objected to. If no final receipt has issued it makes no difference what is comes under.

By Mr. JEFFORDS: I don't see why, if they are instructed to complete the entry.

By the COURT: That brings us back to the same question as to what is payment to the Government. It must be in the nature of an executed contract—an executed transaction—between the Government and the entryman before the Government is in a position to sue for the money.

By Mr. JEFFORDS: I will state, for the purpose of saving the record, that I offer to show by this witness that the proof in
117 this case is in the office and the money was received by Mr. Smith, as is admitted; that he was acting as receiver of public moneys, and, under the instruction contained in letter M of the Commissioner of the General Land Office to the register and receiver at Tucson, they are required to allow this entry without further charge.

By Mr. BARNES: In this particular case the money was returned to the entryman and he has the receipt here.

By the COURT: Objection sustained. The only way to show that that money is due the Government is to show a completed contract under the law, the compliance of the entryman with law, the payment of the money, and the acceptance of it by some act on the part of the Government. Unless the Government has accepted that payment as a payment to it, and has also accepted the proof, which is the other part of the contract which is performed on the part of the entryman, I do not believe the Government is in a position to sue for the money.

By Mr. JEFFORDS: We except to the ruling of the court upon that.

118 Q. Declaratory statement 1005, F. T. Powers; turn to that, please.

A. 1005; I have it.

Q. When was the final receipt issued upon that?

A. I see nothing in the original entry book here showing that it has been issued. That is a transaction with the register entirely.

Q. Declaratory statement 704, Henry Percy Schultz.

A. Declaratory statement 704 is John F. Whitney.

Q. Look at 1704, please; the number may be wrong; Henry Percy Schultz.

A. 1704, Henry Perch Schultz; yes, sir; I have it.

Q. When was final receipt issued in that case?

A. We can't tell anything about it without looking at the tract book. If it has been passed at all there is no memorandum of its passing on this book.

Q. Have you ever received any money on that?

A. I would have to have the book here—to have the entry here.

By the COURT:

Q. Did you state whether or not proof had been made.

A. I didn't say anything about the proof; that is the original entry we were on.

By Mr. JEFFORDS (resuming):

Q. Well, has the proof been made?

119 A. I think it has; but I would want—of course, these things I can't carry in my mind, and I would want the verification of the book here.

Q. What book will you require?

A. In the first place, I would have to look at the plat book to get the number of the entry—that is, one of Smith's—and they all have half numbers or odd numbers. Mr. Brown could step down and get it.

Q. Yes; look at declaratory statement 2414, James Keeting.

A. Yes, sir.

Q. What is the date of the issuance of the final receipt in that case?

A. January 31, 1890.

Q. By whom was it issued?

A. By myself.

Q. Did you receive any money for it?

A. I did.

Q. How much?

A. Two hundred dollars.

Q. Where was the proof?

A. Proof was in the office.

By Mr. BARNES: That is objected to as immaterial; he says the Government got the money.

By the COURT: If the Government has the money for it, yes.
By the WITNESS: The Government has got it.

By Mr. BARNES:

Q. Was that all that was needed to make the final proof
120 to the Government?
A. Yes, sir; that was all that was due the Government.

By Mr. JEFFORDS (resuming):

Q. Now, 1853.
A. I have it.
Q. When was final receipt issued in that case?
A. It has not been issued.
Q. Hasn't been issued yet?
A. No, sir.
Q. Turn to homestead entry 262, Mr. Drake.
A. Original number?
Q. Yes, sir.
A. That entry book is not here. We have only homestead entry book here up to No. 1310.
Q. Turn to desert entry 499, Peter Nikleman. When was final certificate issued in that case?
A. Sept. 26, 1890.
Q. By whom was it issued?
A. The receipt was issued by me.
Q. Under what authority?
A. Letter M, April 30th.
Q. Did you receive any money for it?
A. No, sir.

By Mr. AINSWORTH: Same objection to that as before.
By the COURT: Yes. Same ruling.

Q. Where was the proof at the time you went into office?
A. In the office, sir.
Q. By whom had it been taken?
A. I couldn't say by whom it was taken, but it was there
121 ready to be acted on when I went into the office.
Q. In the receiver's office?
A. Well, it was in the land office.

By Mr. BARNES:

Q. It was acted on by you and Mr. Brown after you went into office?
A. Yes, sir.
Q. And final proof allowed?
A. Yes, sir.
Q. How much was the amount the Government ought to have been paid on that entry?
A. $160—no; $200, I should have said, was the amount that was due.
Q. That is, it was due when the receipt issued?

A. When the receipt issued—no; it would have been $160. That is the final payment that was due.

By Mr. JEFFORDS (resuming):

Q. Was any money paid to you on that entry?
A. No, sir; no money.
Q. That entry was allowed and receipt issued under authority of letter M?
A. Yes, sir; that is it.

By Mr. BARNES:

Q. After you came into the office?
A. Yes, sir.
Q. Had not been passed on by your predecessor?
A. No, sir.

By Mr. JEFFORDS:

Q. The proof was made and was there in the office?
122 A. Yes, sir.

By Mr. BARNES:

Q. If it had not been sufficient, you would have rejected it, would you not?

By Mr. JEFFORDS: I object to that as calling for the witness' opinion and conclusion.

By the COURT: Yes; that is matter of law. I will sustain the objection.

By Mr. JEFFORDS (resuming):

Q. Now, homestead entry 733, original number.
A. The book is not here; I haven't anything prior to 1310 here.
Q. Turn to original desert entry 675, William W. Damron.
A. Yes, sir; I have.
Q. What was the date of the final receipt in that case, Mr. Drake?
A. January 21, 1890.
Q. What was the date of the final proof; do you know?
A. I don't know the date of the proof.
Q. January 21, 1890, you say?
A. That is the date of the certificate and the final receipt.
Q. Who issued the certificate and receipt?
A. Mr. Brown issued the certificate and I issued the receipt.
Q. Did you receive any money on that?
A. Yes, sir.
123 Q. How much?
A. $79.50 is the amount stated here.

By Mr. BARNES:

Q. That is all that was due, is it?

By Mr. JEFFORDS:

Q. Wait a moment—$79.60?
A. No; $79.50.
Q. That was paid to you?
A. Yes, sir.

By Mr. BARNES:

Q. That is all that was due at that time?
A. Yes, sir; all that was due at that time.

By Mr. JEFFORDS (resuming):

Q. Turn to desert entry 844, Mr. Drake, D. E. Huffman.
A. Yes.
Q. When was the final receipt issued in that case?
A. It was issued Dec. 24, 1890.
Q. By whom?
A. The receipt, by myself.
Q. Under what authority?
A. Letter M, April 30th.
Q. Did you receive any money on that entry?
A. No, sir.
Q. Where was the proof when you went into office?
A. It was in the land office.

By Mr. BARNES:

Q. When was the proof passed on?
A. The proof was passed on Dec. 24, 1890.

By Mr. JEFFORDS (resuming):

124 Q. Was Mr. Smith's receipt in the office for that money?
A. Well; his receipt for whom? I don't understand.
Q. To Mr. Huffman.
A. No, sir; I gave the Government receipt to Mr. Huffman myself under authority of letter M.
Q. You received no money from Mr. Huffman?
A. No, sir.
Q. Had Mr. Huffman any receipt from Mr. Smith for any money?
A. I don't know if he did, but if he did it was a personal receipt—private receipt.
Q. You issued the final receipt yourself?
A. Yes, sir.
Q. Under authority of letter M, and received no money for it?
A. None at all.

By Mr. BARNES: We do not like to put in objections all the time, but we wish to urge the same objection to this class of testimony.
By the COURT: Yes.
By Mr. BARNES: Let it be understood right along.

By Mr. BARNES:

Q. The final proof was passed on by you and Mr. Brown after you took charge of the office?

A. Yes, sir.
Q. Preparatory to the issuance of final receipt by you?
A. Yes, sir.

125 By Mr. JEFFORDS (resuming):

Q. Now, 810.
A. Yes; Wm. Sharp.
Q. When was final receipt issued in that case?
A. That was issued the 19th of May, 1890.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Under authority of money being paid to me in cash.
Q. In that case the money was paid to you?
A. Yes, sir.
Q. Was the final proof in the office at that time?
A. The final proof was in the office prior to my taking charge of it.
Q. Do you know whether any money had been paid on it before or not?

By Mr. BARNES: That is objected to as immaterial.
By the COURT: Sustained.
By Mr. JEFFORDS: We except.

By Mr. BARNES:

Q. Final proof in that case was passed on by you and Mr. Brown preparatory to issuance of final receipt?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. Homestead 1102, original.
A. Mary Thomas.
Q. When was final receipt issued in that case?
126 A. March 11, 1890.
Q. By whom was the receipt issued?
A. By myself.
Q. Under what authority?
A. That is one of the cases where the cash was paid to me.

By Mr. BARNES:

Q. Final proof passed on by you and Mr. Brown in that case?
A. Yes, sir.
Q. Preparatory to issuing receipt?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. 1859, Henry Burris, original homestead.
A. Yes.
Q. What is the date of the final receipt in that case?
A. There is nothing to show here that final receipt was ever issued.

Q. You don't know, then, whether final receipt has been issued in that or not?
A. I think it has been, but there is nothing here to show it.
Q. You cannot testify to that, then?
A. No.
Q. Desert entry 780, original number, A. H. Hoadley.
A. Yes; I have it. What about it?
Q. I want the date of the final receipt.
A. July 2, 1890.
127 Q. By whom was it issued?
A. Issued by myself.
Q. Under what authority?
A. Letter M.
Q. Where was the proof when you went into office?
A. It was in the land office at the time I went in.
Q. How much was due the Government on that?
A. $643.60.

By Mr. BARNES:

Q. That proof was passed on by you and Mr. Brown, as register, preparatory to issuing the receipt?
A. Yes, sir.

By Mr. JEFFORDS:

Q. Under authority of letter M?
A. Yes, sir.
Q. Was there any endorsement on the final proof as to whether or not the money was received?

By Mr. BARNES: We object to that as not the best evidence of the fact.

A. It did.

By Mr. JEFFORDS: I withdraw that.
By the COURT: Yes; it would not be competent, anyway.

Q. Original homestead entry 982, S. W. Pomroy. What is the date of the final receipt in that case?
A. This is the original entry; there is no memorandum here.
Q. You cannot at present, then, testify to that item?
A. There is nothing here except the original entry.
128 Q. Do you know who issued the final receipt in that case?
A. I think the final receipt has been entered, and I think the money was repaid to him (interrupted)——
Q. Repaid to whom?
A. To Pomroy.

By Mr. BARNES:

Q. Well, that part you don't know; but the money was paid to you by Pomroy himself?
A. Yes, sir.
Q. The entryman paid you the money for the entry?
A. Yes.

By Mr. JEFFORDS (resuming):

Q. Declaratory statement 2230, John Turkington.
A. Yes, sir.
Q. By whom was the final receipt issued in that case?
A. By myself.
Q. At what date?
A. July 2, 1890.
Q. Under what authority?
A. Letter M.
Q. Did you receive any money upon that entry?
A. No, sir.
Q. Where was the proof at the time you went into the office?
A. In the land office, prior to my taking charge of it.
Q. How much was due the Government on that entry?
A. $200.

By Mr. BARNES:

Q. Who passed on the final proof preparatory to issuing of final receipt?
A. Mr. Brown and myself.

129 By Mr. JEFFORDS (resuming):

Q. Under instructions contained in letter M?
A. Yes, sir.

By Mr. BARNES:

Q. On the same date the receipt was issued?
A. It was entered up the same date; yes, sir.

By Mr. JEFFORDS (resuming):

Q. Homestead 812, original entry, J. M. Lopez.
A. 639½ is the number of it; yes.
Q. What is the date of the issuance of final receipt in that case?
A. July 2d, 1890.
Q. Issued by whom?
A. The certificate by Mr. Brown.
Q. Where you issued final receipts there were all issued upon Mr. Brown's certificate, were they not?
A. Certainly.

By Mr. BARNES: Oh, yes; that will be understood right along.

Q. Now, under what authority did you issue that final receipt?
A. Letter M.
Q. Did you receive any money at all on this entry?
A. No, sir.
Q. How much was due the Government on that entry?
A. $193.11.
Q. Where was the proof when you went into office?
130 A. In the land office.

By Mr. BARNES:

Q. When and by whom was the final proof passed on preparatory to the issuing of that receipt?

A. Passed on by Mr. Brown and myself, July 2d, 1890.

Q. Did you have any affidavits of the entryman to consider on the question?

A. It was issued in conformity with that letter. He had to do certain things; he had to make proof that he paid the money to Smith.

Q. He did make that proof?

A. Yes, sir.

Q. That is true as to all of these entries, is it?

A. Yes, sir; true as to all that letter applied to.

Q. How about taking proof of non-alienation as to this land?

A. In some cases we did; all the requirements were carried out.

Q. Had to furnish further proof before they could be passed on; had to furnish proof in addition to this proof already in the office before they could be passed on?

A. No, sir.

Q. How about proof of non-alienation?

A. I think that was done away with on account of that letter.

Q. Was it done away with or did the department require you to certify to it?

131 Mr. JEFFORDS: That is objected to as calling for matter of record, and it is not one of the things required by law.

By the COURT: I don't see how that is material, if final receipt issued. The objection will be sustained.

By Mr. AINSWORTH: We have a right to go into it on cross-examination to find out what was done.

By the COURT: I understood the witness to say that final receipt had issued in this case, and it seems to me immaterial what the Government may have done to satisfy itself that payment had been made. The question is whether payment was made, and not how the Government became satisfied of that fact.

By Mr. JEFFORDS (resuming):

Q. Declaratory statement 1962, J. B. George. When was final receipt issued in that case?

A. July 24, 1890.

Q. By whom was it issued?

A. By myself.

Q. Under what authority?

A. Letter M.

Q. How much was due the Government on that entry?

A. Two hundred dollars.

Q. Was any money paid to you on that entry?

A. No, sir; there was not.

132 Q. Where was the final proof at the time you went into the office?

A. In the land office.

By Mr. BARNES:

Q. Final proof was passed on by whom, and on what date?
A. Passed on by Mr. Brown and myself, July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. Declaratory statement 2128.
A. Thomas E. Jones.
Q. What was the date of the final receipt in that case?
A. July 2d, 1890.
Q. By whom issued?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Was any money paid to you upon that entry?
A. No, sir.
Q. How much was due the Government on that entry?
A. 850.
Q. Where was the proof at the time you went into the office?
A. In the land office.

By Mr. BARNES:

Q. By whom and when was the final proof passed on preparatory to the issuing of final receipt?
A. By Mr. Brown and myself, July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. Declaratory statement 2350.
A. David D. Revis.
Q. When was final receipt issued in that case?
A. January 2d, 1890.
133 Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. By authority of the case being paid to me.
Q. Declaratory statement 2336.
A. Henry Freichler.
Q. When was final receipt issued in that case?
A. February 21, 1890.
Q. By whom?
A. By myself.
Q. Under what authority?
A. By authority of cash being paid to me, $200.
Q. Declaratory statement No. 2042.
A. Charles A. Luke.
Q. When was final receipt issued in that case?
A. April 18, 1890.
Q. By whom issued?
A. By myself.
Q. Under what authority?
A. Cash, $200.
Q. Declaratory statement 1792.

A. James T. L. Waters. There is no record here about when that was issued.

Q. Is there a record anywhere in the office about that?

A. I can tell by looking at the plat book.

By Mr. BARNES:

Q. Is it complete there, according to the book?

A. I can't tell anything about that from this book.

By Mr. JEFFORDS (resuming):

Q. Declaratory statement 1870.

A. Emma Sampson.

134 Q. When was final receipt issued in that case?

A. July 2d, 1890.

Q. By whom was it issued?

A. By myself.

Q. Under what authority?

A. Authority of letter M.

Q. Was any money paid to you on that entry?

A. No, sir.

Q. How much was due the Government on that entry?

A. $100.

By Mr. BARNES:

Q. By whom and what date was final proof passed on preparatory to that receipt being issued?

A. By Mr. Brown and myself, July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. Declaratory statement 1869.

A. Lewis O. Wiley.

Q. When was final receipt issued in that case?

A. Issued July 2d, 1890.

Q. By whom issued?

A. By myself.

Q. Under what authority?

A. Authority of letter M.

Q. Did you ever receive any money on that entry?

A. No.

Q. How much was due the Government on it?

A. $200.

Q. Where was the proof at the time you went into the office?

A. It was in the land office.

By Mr. BARNES:

Q. By whom and when was final proof passed on preparatory to that receipt?

135 A. By Mr. Brown and myself, July 2, 1890.

By Mr. JEFFORDS (resuming):

Q. Declaratory statement No. 2231.

A. George M. Tiffany.
Q. Yes.
A. It is entered up here all right.

By Mr. BARNES:

Q. What do you mean by "all right"?
A. As original declaratory statement.

By Mr. JEFFORDS (resuming):

Q. What is the date of the final certificate?
A. There is no entry here about it at all. I don't know whether final proof is issued or not.
Q. Declaratory statement 1793.
A. John T. Hord.
Q. When was final receipt issued in that case?
A. July 2, 1890.
Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. Letter M, April 30th.
Q. Did you receive any money on that entry?
A. No, sir.
Q. How much was due the Government on it?
A. $99.04.
Q. Where was the final proof when you went into the office?
A. It was in the land office.

By Mr. BARNES:

Q. By whom and what date was final proof passed on preparatory to the issuing of that receipt?
136 A. By Mr. Brown and myself, on July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. 2119, W. H. Skinner.
A. I have it.
Q. What was the date of issuing of final receipt in that case?
A. Jan. 28, 1890.
Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. By authority of the cash being paid to me by the entryman.
Q. Declaratory statement 1771.
A. F. J. Horton.
Q. What was the date of the issuance of final receipt in that case?
A. March 17, 1890.
Q. By whom was it issued?
A. By myself.
Q. By what authority?
A. Cash, $200.
Q. Now, declaratory statement No. 1800.

A. C. H. Slankard. There is no record here whether final receipt has been issued or not.

Q. 2217, Felix Gallardo. When was final receipt issued in that case?

A. July 2d, 1890.

Q. By whom?

A. By myself.

Q. Under what authority?

A. Letter M.

Q. Did you ever receive any money on that entry?

A. No. sir.

137 Q. How much was due the Government on it?

A. $198.46.

Q. Where was the final proof when you entered the office?

A. It was in the land office.

By Mr. BARNES:

Q. By whom and on what date was final proof passed on preparatory to issuing that receipt?

A. By Mr. Brown and myself, July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. Under and by virtue of letter M?

A. Yes, sir.

Q. Now, 1873.

A. Wilfred A. Fiege.

Q. What was the date of issuance of final receipt in that case?

A. November 25, 1890.

Q. By whom was it issued?

A. By myself.

Q. Under what authority?

A. Letter M.

Q. Did you ever receive any money upon that entry?

A. No, sir.

Q. Where was final proof in that case when you went into office?

A. It was in the land office.

By Mr. BARNES:

Q. By whom and what date was final proof passed on preparatory to that receipt?

A. By Mr. Brown and myself, November 25, 1890.

138 By Mr. JEFFORDS (resuming):

Q. 2137.

A. Frank W. Fry.

Q. When was final receipt issued in that case?

A. July 2, 1890.

Q. By whom?

A. By myself.

Q. Under what authority?

A. Authority of letter M.

Q. Did you receive any money on that entry?
A. No, sir.
Q. How much was due the Government on it?
A. $100.

By Mr. BARNES:

Q. Passed on by you and Mr. Brown, as register, on the date the receipt was issued?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. Where was the proof when you entered the office?
A. It was in the land office.
Q. Now, 1923.
A. Henry T. Miller—no; Willis. There is no record of final proof being made here.
Q. 2417.
A. Joseph Layton.
Q. What was the date of issuance of final receipt in that case?
A. Feb. 11, 1890.
Q. By whom was it issued?
A. By me.
Q. By virtue of what—under what authority?
A. Cash paid to me.
Q. 2359.
A. Charles R. Rogers.
139 Q. What is the date of final receipt in that case?
A. May 9, 1890.
Q. Who issued it?
A. I did.
Q. Under what authority?
A. Cash.
Q. 2356.
A. Frank L. Proctor.
Q. What was the date of the issuance of final receipt in that case?
A. July 2, 1890.
Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. Authority of letter M.
Q. Did you receive any money on that entry?
A. No, sir.
Q. How much was due the Government?
A. Two hundred dollars.
Q. Where was the proof when you went into the land office?
A. In the office.

By Mr. BARNES:

Q. By whom and when was the proof passed on preparatory to final receipt?
A. By Mr. Brown and myself, July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. Original desert-land entry 770.
A. Thomas Murphy.
Q. What was the date of the final receipt in that case?
A. January 10, 1890.
Q. By whom was it issued?
A. Issued by myself.
140 Q. By virtue of what authority?
A. By virtue of cash.

By Mr. BARNES:

Q. How much was due the Government in that case?
A. $640.

By Mr. JEFFORDS (resuming):

Q. Desert 653.
A. David Turner.
Q. What was the date of the final certificate in that case?
A. Jan. 7, 1890.
Q. By whom issued?
A. By myself.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. $160?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. Homestead 781, Isador Asher. That was one you could not find.
A. If you will go along with the desert entries, it will facilitate it very much.
Q. Very well; 704.
A. Sarah F. Clay.
Q. Under what authority was that final receipt issued?
A. Under authority of cash, April 18, 1890.

By Mr. BARNES:

Q. How much cash?
A. $360.

By Mr. JEFFORDS (resuming):

Q. Desert 469.
A. Henry Armer.
Q. Under what authority was final receipt issued in that
141 case?
A. Cash.

By Mr. AINSWORTH:

Q. What is the date?
A. March 17, 1890.
Q. How much paid?
A. $74.19.

By Mr. JEFFORDS (resuming):

Q. 675, desert entry, Wm. Damron. We have been over that, I believe.
A. That was cash.
Q. Desert entry 619, S. P. Vickers, and 618, J. V. Vickers.
A. I don't think final receipts ever issued for those. Those entries are on unsurveyed land.
Q. Desert entry 797, J. H. Brown.
A. That was issued July 2d, 1890, under authority of letter M.
Q. Final receipt was issued when?
A. July 2d, 1890.
Q. Under authority of that letter?
A. Yes, sir.
Q. Did you receive any money on that entry?
A. No.
Q. How much was due the Government?
A. $120.
Q. Where was the proof when you entered the office?
A. In the land office.
Q. What was the date of the entry, if you know?
A. July 8, 1889—the date of the entry, you say?
Q. Yes, sir.
A. I can't tell it here.

By Mr. BARNES:

Q. Final proof was passed on the same date as final receipt
142 issued by you and Mr. Brown?
A. Yes, sir; July 2d.

By Mr. JEFFORDS (resuming):

Q. 1191, Thomas Davis. What was the date of the issuance of final receipt in that case?
A. I can't tell from here.
Q. 776.
A. William T. Hanna.
Q. What was the date of issuance of final receipt in that case?
A. May 20, 1890.
Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. Cash, $240.
Q. 777.
A. Terah M. Copes.
Q. What was the date of issuance of final receipt in that case?

A. May 20, 1890.
Q. By whom issued?
A. Myself.
Q. By what authority?
A. Cash.

By Mr. AINSWORTH:

Q. How much?
A. $80.

By Mr. JEFFORDS (resuming):

Q. Desert entry 1382.
A. Herman Bendal.
Q. What was the date of issuance of final receipt in that case?
A. March 17, 1890.
Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. Cash.
143 Q. How much?
A. $478.47.
Q. Desert entry 1451.
A. Anna W. Horan.
Q. By whom was final certificate issued in that case?
A. By myself.
Q. On what date?
A. January 31, 1890.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much?
A. Eighty dollars.

By Mr. JEFFORDS (resuming):

Q. Desert entry 791.
A. David W. Kean.
Q. What was the date of issuing of final certificate in that case?
A. March 22, 1890.
Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much?
A. $638.38.

By Mr. JEFFORDS (resuming):

Q. Desert entry 705.
A. Harriet P. Hine.

Q. Final receipt issued when?
A. Final receipt, February 19, 1890.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much?
A. $320.

144 By Mr. JEFFORDS (resuming):

Q. 829, desert entry.
A. M. M. Jackson.
Q. What was the date of issuance of final receipt?
A. July 2, 1890.
Q. And by whom issued?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Did you receive any money on that entry?
A. No, sir.
Q. How much was due the Government?
A. $80.
Q. Where was the proof at the time you entered on the duties of the office?
A. In the land office.

By Mr. BARNES:

Q. On what date and by whom was final proof passed on preparatory to the issuance of that receipt?
A. Mr. Brown and myself, July 2nd.

By Mr. JEFFORDS (resuming):

Q. 887.
A. Van R. Beecham.
Q. What was the date of the issuance of that final receipt?
A. July 2, 1890.
Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Did you receive any money for the Government on that entry?
A. I did not.
Q. Where was the proof when you entered office?
145 A. It was in the land office.

By Mr. BARNES:

—. By whom and when was final proof passed on preparatory to the issuing of that receipt?
A. By Mr. Brown and myself July 2d, 1890.
Q. How much was due the Government on that?
A. $320.

By Mr. JEFFORDS (resuming):

Q. How much was due on that entry?
A. $320. That was the balance due on that final proof.

By Mr. BARNES:

Q. That was the amount due the Government?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. Desert entry 924.
A. Edwin A. Torrea.
Q. What was the date of issuance of final receipt in that case?
A. There is no record here; I would have to look at the plat book.
Q. 817, desert entry.
A. Oscar L. Pease.
Q. What was the date of the final receipt issued in that case?
A. March 17, 1890.
Q. By whom issued?
A. By myself.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much?
A. Two hundred dollars.

146 By Mr. JEFFORDS: May it please the court, the homestead entry books are not here and it is now four o'clock.

By the COURT: If it is not insisted by the other side that we go on I think we may take an adjournment at this time. The jury are again instructed to keep in mind the admonition of the court with reference to talking about the case of forming or expressing any conclusion about the case until finally submitted; and with this admonition you are dismissed until Monday morning, at 9 o'clock.

Adjourned till Monday morning, 9 o'clock.

MONDAY, *February 16th*, 1891—9 o'clock a. m.

Continuation of trial pursuant to adjournment.

CHARLES R. DRAKE called to the stand.

Direct examination resumed by Mr. JEFFORDS:

Q. Turn to homestead 771, Mr. Drake, original number,
147 F. G. Blaisdell.
A. Yes, sir; Frank G. Blaisdell. I have not the cash book with me, but I know about that entry. I can testify to that.
Q. Was proof taken in it?
A. Proof was taken. It was one of the proofs that was in the office when I came in, and the money was repaid on it to me by Mr. Blaisdell.

By Mr. AINSWORTH:

Q. How much?
A. $200.

By Mr. BARNES:

Q. It was paid to you, not repaid. We object to that part of it.
A. Yes, sir; it was paid to me by Mr. Blaisdell.
Q. And final proof passed on by you and Mr. Brown?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. 1157, original number.
A. Pedro Aguirre; that was paid by Mr. Aguirre.

By Mr. BARNES:

Q. To you?
A. Yes, sir.
Q. How much?
A. Ten dollars.

By Mr. JEFFORDS (resuming):

Q. How much is due the Government?
148 A. There was six dollars due, as commissions, and four dollars for reducing the testimony to writing.
Q. Was that a completed entry?
A. No, sir; that was a homestead entry. The final number was 266; the original number, 1157.
Q. Turn to original homestead 781.
A. Isadore Asher. That was a commuted homestead.
Q. When was proof taken in that case?
A. Taken prior to my going into office.
Q. Who issued final receipt in that case?
A. I did.
Q. Under what authority?
A. Letter M—April 30th.
Q. Any money paid to you on it?
A. No, sir.
Q. How much was due?
A. Two hundred dollars.

By Mr. BARNES:

Q. By whom and when was final proof passed on?
A. July 2d, 1890, by Mr. Brown and myself.
Q. Preparatory to final receipt issuing?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. Homestead 619.
A. I will have to get the cash entry. We have different books for these commuted homesteads.
Q. Well, original homestead 1195.

A. Carmen Paduken.

149 Q. Final receipt issued in that case?

A. Yes, sir; December 24, 1889.

Q. By whom?

A. By myself.

Q. Under what authority?

A. Cash.

Q. Paid you?

A. Yes, sir; paid to me.

By Mr. AINSWORTH:

Q. How much?

A. Ten dollars.

Q. I would like to ask if that was all that was due the Government—ten dollars.

A. Yes, sir; that was all. That is final certificate No. 259.

By Mr. JEFFORDS (resuming):

Q. Who issued it?

A. I did.

Q. When?

A. January 11, 1890, by authority of cash.

By Mr. AINSWORTH:

Q. How much?

A. Ten dollars.

Q. That was all that was due?

A. Yes, sir; that was all that was due.

By Mr. JEFFORDS (resuming):

Q. Homestead 960, Mr. Drake—Pomroy.

A. William E. Pomroy; yes, sir. That was a commuted homestead. That was paid by himself.

Q. By Pomroy?

A. Yes, sir.

Q. To whom?

A. To me.

150 Q. How much?

A. $200.

By Mr. AINSWORTH:

Q. When?

A. Well, it was paid—I haven't the date here, but it was paid some time prior to the issuing of letter M, April 30th. I haven't the books here, but I know the circumstance and can testify to it. He paid the money himself.

By Mr. JEFFORDS (resuming):

Q. 436, Mr. Drake.

A. Lauterio Yesisas.

Q. Final receipt issued in that case?

A. Yes, sir; March 27, 1890.
Q. By whom?
A. Myself.
Q. Under what authority?
A. Cash.
Q. Paid to you?
A. Yes, sir; paid to me.

By Mr. AINSWORTH:

Q. How much?
A. Ten dollars.
Q. Is that all that was due?
A. Yes, sir; that was all that was due.

By Mr. JEFFORDS (resuming):

Q. 430, original homestead.
A. Charles R. Hazard, 273. Certificate issued March 18, 1890, by myself. The amount was ten dollars.
Q. Paid to you?
A. Yes, sir; paid to me.

151 By Mr. AINSWORTH:

Q. Was that all that was due, Mr. Drake?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. Homestead 363.
A. Jesus Aros, final certificate No. 374, issued Nov. 28, 1890.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Cash.
Q. Paid to you?
A. Yes, sir; paid to me—$7.

By Mr. AINSWORTH:

Q. Was that all that was due the Government?
A. That was all that was due.

By Mr. JEFFORDS (resuming):

Q. Homestead 381.
A. John L. Storey.
Q. Final receipt ever issued in that case, Mr. Drake?
A. Yes, sir.
Q. When was it issued?
A. On December 20, 1890.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Cash, ten dollars.

By Mr. AINSWORTH:

Q. Was that all that was due the Government, Mr. Drake?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. Why was not that issued under letter M?

152 By Mr. AINSWORTH: That is objected to as irrelevant and immaterial. He got the cash for it.
By the WITNESS: I see no annotations here.
By the COURT: Yes; I think it immaterial.

By the WITNESS: What was the one prior to that?
Q. Jesus Aros.
A. Well, if the court please, I will have to go over and get my (interrupted)——

By Mr. AINSWORTH: The answer is not required. The court sustained the objection.
By Mr. JEFFORDS: I don't know whether the witness stands on that answer or not.
By the WITNESS: I wish to withdraw that answer.

By Mr. AINSWORTH:

Q. Was it 381 or 363?
A. 363 I refer to. There is no annotation here as to its having been issued under authority of letter M, but it is my impression they were, but they are not on this book and may be on my book.

By Mr. AINSWORTH:

Q. It is marked on your book as a cash entry?
A. It is marked as cash without any annotation. The reason I made that answer was all entries of Smith's allowed under
153 Commissioner's letter M have a fractional number, and they were put on as of the date they were filed in the land office, and under the Commissioner's letter we are instructed to put them on prior to these dates. Therefore I am uncertain whether it was issued under that letter or not, or it may have been an error in entering them up in this book in that way.
Q. It is only 817, anyway?
A. Yes.

By Mr. JEFFORDS (resuming):

By Mr. JEFFORDS: The witness says it will be necessary for him to go and get his other books. He can get them more speedily himself than by sending for them.
By the COURT: Very well.
(The witness retired from the stand and the court-room and returned with several books.)

Q. Now, 363.
A. In that case the proof was in the office at the time I went in,

for which Mr. Smith had received the money. When we arrived at those proofs and were ready to pass on them they were irregular and were rejected, and there was new proof made, and the cash was paid for the entry.

Q. On the new proof?

154 A. Yes, sir; on the new proof, and the same ruling maintained with entry 381. They came on as cash entries, both of them. The old proofs were rejected.

By Mr. BARNES:

Q. And new proofs made and finally passed on by you and Mr. Brown?

A. Yes, sir.

Q. The old proofs were irregular and both were readvertised and new proof made?

A. (No answer.)

By Mr. JEFFORDS (resuming):

Q. 16.

A. William C. Lemon. That was passed April 22, 1890.

By Mr. BARNES:

Q. Cash entry?

A. Cash entry.

By Mr. AINSWORTH:

Q. How much?

A. $9.98.

Q. That was all that was due the Government?

A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. 262.

A. Lewis J. Hedgepeth. Final proof is not issued on that yet.

Q. 423.

A. Sanovia Gonsales; issued May 31, 1890.

Q. By whom?

A. By myself.

Q. Under what authority?

A. Letter M, April 30th.

155 Q. Any money paid to you on that entry?

A. No, sir.

Q. How much was due the Government?

A. $8.34—62.45 acres.

Q. Where was the final proof at the time you entered the office?

A. It was in the land office.

By Mr. BARNES:

Q. By whom and when was final proof passed on preparatory to the issuing of that receipt?

A. By Mr. Brown and myself, November 25, 1890.

By Mr. AINSWORTH:

Q. Any extra proofs required other than you found there?

A. No, sir; nothing more than was required by law—the affidavit and documentary evidence of his having paid the money; that was what would be required by letter M.

By Mr. JEFFORDS (resuming):

Q. 633.

A. Delos E. Huffman.

Q. Has final proof been issued upon that entry?

A. Yes, sir; it was a commuted homestead; 641½ is his final number.

Q. Has final certificate issued on it?

A. Yes, sir; final receipt issued.

Q. By whom was it issued?

A. By myself.

Q. When?

A. July 2d, 1890.

156 Q. Under what authority?

A. Letter M.

Q. Did you receive any money at all on that entry?

A. —, sir; I did not.

Q. How much was due the Government?

A. $200.

Q. Where was the proof when you went into the land office?

A. In the land office.

By Mr. BARNES:

Q. By whom was final proof passed on, and when?

A. By Mr. Brown and myself, July 2d, 1890.

By Mr. AINSWORTH:

Q. Is there more than one D. E. Huffman?

A. I don't think there is. The final receipt was issued July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. Were there any other fees due on that entry except the two hundred dollars?

A. That was all on that entry. Well, I don't remember whether proof was taken in the land office or not; if it was, the fees for taking the testimony was due on it. The land lies out where they couldn't take the proofs very well, and perhaps the fees for taking the testimony was due, but I don't remember whether it was taken in the office or not. The fees for reducing the testimony to writing, if it was taken in the land office in Tucson, would be four dollars additional, in addition to the price of the land.

157 Q. 1102, original homestead entry, Mr. Drake.

A. Mary Thomas.

By Mr. AINSWORTH: You inquired about that on Saturday. That was a cash entry.

By Mr. JEFFORDS: Yes; that is true.

Q. Homestead 1859.
A. That must be a mistake; the numbers don't run that high.
Q. Look at pre-emption 1859, Henry Burress.

By Mr. AINSWORTH: You have had that.

A. Yes; that is a cash entry.
Q. Homestead 231.
A. Jose Antonio Rodriguez, final certificate issued Dec. 20, 1889.
Q. By whom issued?
A. By myself.
Q. Under what authority?
A. Cash, ten dollars.

By Mr. AINSWORTH:

Q. That was all that was due, Mr. Drake?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. 982.
A. Simon W. Pomroy.

By Mr. AINSWORTH: We had that Saturday; that was a cash entry.

Q. That is true. Homestead 560.
A. John S. Waddell. That was made Feb. 1st, 1890; final
158 receipt issued that date.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much due?
A. $9.11.

By Mr. AINSWORTH:

Q. That was all that was due the Government, was it?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. 361.
A. Jose J. Acuña.
Q. What was the date of the final receipt in that case?
A. Final receipt issued in that case.
Q. By whom?
A. By myself.
Q. Under what authority?
A. It was in the land office.
Q. Did you ever receive any money on that entry?
A. No, sir.

By Mr. AINSWORTH:

Q. How much was due the Government?
A. $8.05.

By Mr. BARNES:

Q. By whom and when was that proof passed on?
A. By Mr. Brown and myself, July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. 860, homestead.
A. William C. Despain.
159 Q. Final receipt ever issued in that case?
A. Yes, sir.
Q. By whom was it issued?
A. By myself.
Q. When was it issued?
A. On July 2, 1890.
Q. Under what authority?
A. Letter M.
Q. Did you ever receive any money on that entry?
A. No, sir.
Q. Where was that proof before you succeeded Mr. Smith as receiver of public moneys?
A. In the land office.

By Mr. AINSWORTH:

Q. How much was due the Government on that?
A. $200.

By Mr. BARNES:

Q. By whom was final proof passed on preparatory to final receipt?
A. Mr. Brown and myself, July 2d, 1890.
Q. You found the proofs regular?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. Original homestead 213, Mr. Drake.
A. Simon Madrid.
Q. Was final receipt issued in that case?
A. Final receipt was issued July 2d, 1890.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Was any money paid to you on that entry?
A. No, sir.
Q. How much was due the Government?
A. Ten dollars.

By Mr. BARNES:

Q. How was final proof passed on, and when?
A. By Mr. Brown and myself, July 2d, 1890.

160 By Mr. JEFFORDS (resuming):

Q. Original entry 783.
A. Francis J. Dysart.
Q. Final receipt issued when?
A. March 20, 1890.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Cash, $200.
Q. Homestead 266.
A. Benedict Mosier; final receipt issued Dec. 27, 1889.
Q. Under what authority?
A. Cash.
Q. Paid to you?
A. Yes, sir; paid to me.

By Mr. AINSWORTH:

Q. How much?
A. Ten dollars.

By Mr. JEFFORDS (resuming):

Q. 697.
A. John Asbell.
Q. What is the date?
A. Feb. 15, 1890, final receipt issued.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Cash.

By Mr. AINSWORTH:

Q. Paid to you?
A. Yes, sir; $200.

By Mr. JEFFORDS (resuming):

Q. 147, homestead.
A. William Telfor; final receipt issued Nov. 25, 1890.
161 Q. By whom?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Did you ever receive any money on that entry?
A. No, sir.
Q. Where was the proof when you went into office?
A. It was in the land office.

By Mr. AINSWORTH:

Q. How much was due the Government?
A. Ten dollars.

By Mr. BARNES:

Q. Who examined the proof and passed on it?
A. Mr. Brown and myself.
Q. What date?
A. Nov. 25, 1890.

By Mr. AINSWORTH:

Q. Was there anything lacking in the proof?
A. I don't just remember whether there was any informality.

By Mr. BARNES:

Q. If there has been any irregularity you would have rejected them, would you not?
A. There wasn't any proofs passed on till January 2d—July 2d. The fact of there being so many on July 2d was owing to there being so much business in the office that we couldn't take them up. That letter was received in due course of time, but we
162 didn't get on any of them till July, and we had to hold up awhile on them until we could get time to get off another batch.

By Mr. BARNES:

Q. All that were not regular you rejected?
A. Yes, sir.
Q. And others were passed on?
A. (No answer.)

By Mr. JEFFORDS (resuming):

Q. Was final receipt issued in this case?
A. Yes, sir; and the proofs gone up.
Q. Homestead 162.
A. John G. Ward. Final receipt issued July 2d, 1890.
Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Did you ever receive any money on that entry?
A. No, sir.
Q. How much was due the Government on it?
A. Ten dollars.
Q. Where were the proofs?
A. In the land office.
Q. When you entered the office?
A. Yes, sir.

By Mr. BARNES:

Q. And final proof was passed on by you and Mr. Brown, same as the others, July 2d, 1890?
A. Yes, sir; the same.

By Mr. JEFFORDS (resuming):

Q. Now, 787, homestead.
A. James H. McClintock. Final receipt issued July 2d, 1890.
163 Q. By whom?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Did you ever receive any money on that entry?
A. No, sir.
Q. Where were the proofs when you went into the land office?
A. In the land office.
Q. How much was due the Government on that entry?
A. $200.

By Mr. BARNES:

Q. Final proofs passed on by whom, and when, Mr. Drake?
A. By Mr. Brown and myself, July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. 922, Mr. Drake—Geo. B. Low.
A. Final proof passed on and receipt issued Sept. 27, 1890.
Q. By whom was the receipt issued?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Did you ever receive any money on that entry?
A. No, sir.
Q. How much was due the Government on that?
A. $197.26.
Q. Where were the proofs when you went into office?
A. In the land office.
Q. Were there any other fees due on that entry?
A. Well, I think in all probability that proof was made at the land office. I can't remember, but if it was made there would
164 be four dollars to reduce the testimony to writing.
Q. Is there any book in the land office by which you can tell whether that was so or not?
A. I can tell by looking at the cash book only.

By Mr. BARNES:

Q. Those fees would go to the office if the proof was taken there?
A. Yes, sir. If they were not taken by us there would not be anything due. If it was taken in the land office that amount would be additional.

Q. By whom and when was final proof passed on in this case?
A. September 27, 1890.

By Mr. JEFFORDS (resuming):

Q. Homestead 1060.
A. Thomas H. Haggerty.
Q. Final receipt issued in that case?
A. Yes, sir. Final receipt issued March 16–17, 1890.
Q. Who was it issued by?
A. By myself.
Q. Under what authority?
A. Cash.

By Mr. AINSWORTH:

Q. How much?
A. $200.

By Mr. JEFFORDS (resuming):

Q. Homestead 670.
A. James W. Hendrix.
Q. Was final receipt issued in that case?
165 A. April 22, 1890, final receipt issued.
Q. By whom?
A. By me.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much?
A. $9.99.

By Mr. JEFFORDS (resuming):

Q. Homestead 932.
A. Ira W. Knight.
Q. Was final receipt issued in that case?
A. Yes, sir.
Q. When?
A. Final receipt issued Dec. 20, 1889.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Cash, ten dollars.
Q. 795, original homestead.
A. Giovanni Pasquale.
Q. Has final receipt issued in that case?
A. Yes, sir; changed from "D. S." to homestead. I don't think final proof is passed on yet.
Q. Is there no way of telling?
A. I don't think it has been because this is the book that would show it if it has been.
Q. 767.

A. Jacob A. Linder.
Q. Final receipt issued in that case?
A. Yes, sir; it has been issued.
Q. By whom?
A. By myself.
Q. Of what date?
A. July 2, 1890.
166 Q. Under what authority?
A. Letter M.
Q. Did you ever receive any money on that entry?
A. No, sir.
Q. How much was due the Government?
A. Ten dollars.
Q. Where was the proof when you succeeded Mr. Smith?
A. In the land office.

By Mr. BARNES:

Q. By whom and when was final proof passed on preparatory to issuing final receipt?
A. By Mr. Brown and myself, July 2d, 1890.

By Mr. JEFFORDS (resuming):

Q. 691.
A. Refugia A. de Schwenker.
Q. When was final receipt issued?
A. March 20th, 1890, the final proof was passed on.
Q. By whom was final receipt issued?
A. Issued by myself.
Q. Under what authority?
A. Cash.

By Mr. AINSWORTH:

Q. How much?
A. Ten dollars.

By Mr. JEFFORDS (resuming):

Q. 307.
A. John J. Horton.
Q. Has final certificate issued in that case?
A. January 22d, 1890.
167 Q. By whom was it issued?
A. By myself.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much?
A. Ten dollars.

By Mr. JEFFORDS (resuming):

Q. 267.

A. John S. Mosier. Final receipt issued Dec. 27, 1889.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much cash?
A. Ten dollars.

By Mr. JEFFORDS (resuming):

Q. 747, original homestead.
A. James T. Hildreth. Final receipt issued April 18, 1890, by myself.
Q. Under what authority?
A. Cash.

By Mr. BARNES:

Q. How much cash?
A. Seven dollars. It is fractional.

By Mr. JEFFORDS (resuming):

Q. Homestead 276.
A. Jose Maria Martinez.
Q. Has final receipt issued?
A. Yes, sir.
Q. When?
A. April 18, 1890.
Q. By whom?
A. By myself.
Q. Under what authority?
A. Cash, ten dollars.
168 Q. 487, Chas. Odell.
A. That was passed Sept. 8, 1890.
Q. How is that?
A. The final receipt was issued then.
Q. By whom was final receipt issued?
A. By myself.
Q. Under what authority?
A. Letter M.
Q. Did you ever receive any money on that entry?
A. No, sir.
Q. How much was due the Government on it?
A. Seven dollars.
Q. Where was the proof when you went into the land office?
A. In the land office.

By Mr. BARNES:

Q. By whom and when was final proof passed on?
A. By Mr. Brown and myself Sept. 8, 1890.

By Mr. JEFFORDS: That is all there is on the list.

By Mr. BARNES:

Q. In all these cases where you have testified to final receipt issuing by authority of cash, you mean cash paid to you as receiver?

A. Yes, sir; cash paid to me.

By Mr. JEFFORDS: Before the witness leaves the stand I offer to prove by him that in all of these cases which he has been examined about where he said cash was paid to him by the entryman that the proof had been taken prior to his entering upon the
169 duties of the office of receiver of the land office, and that the moneys before that time had been paid in to Fred. W. Smith, as his predecessor, as receiver of public moneys.

By Mr. BARNES: That we object to; and he could not know because he wasn't there.

By Mr. AINSWORTH: It would be hearsay, and we object to it as irrelevant and immaterial whether they did or did not pay it to Mr. Smith.

By the COURT: It seems to me a common-sense proposition that if they could draw it down the Government could not recover from Smith for paying it over to them. That brings us again to the question whether payment to him in any event is payment to the United States, and it becomes public moneys of the United States. On Saturday I expressed my view of that, that it must be an acceptance by the United States as a payment, and if they have accepted it as a payment then it becomes public moneys; on the other hand, if they have accepted a subsequent payment, they certainly could not mean by that that they took the first payment as a payment
170 to the Government. The Government could not put itself in the position of accepting money twice in the same transaction; that would be an inconsistent position, of course, for the Government to take, and the only amount they could recover would be the amount they had accepted in payment of the land, and if they accepted a subsequent payment they certainly would have no right to the first, and the money paid first did not therefore become public moneys, and the objection will be sustained.

By Mr. JEFFORDS: I had no desire to discuss it further, because I so understood the ruling of the court; I simply wished to save the record on the question, and we now except to the ruling of the court and avow that we would prove these facts by this witness.

By Mr. BARNES:

Q. Up to the receipt of letter M, April 30th, the Government refused to treat these as payments and refused to authorize you to pass on proofs and issue receipts?

A. Yes, sir; it did.

Q. And only by authority of letter M was it that these receipts were issued which came in that class?

171 A. Yes, sir.

Redirect examination:

Q. You say the Government refused to take these as payments up to that time when you received letter M; had you had any correspondence with the Government on the subject or had it expressed its intention one way or another?

A. I had demanded payment from all those whose proofs were there; I notified them of the fact that their proofs were there ready to be passed on, and upon the receipt of the money they would be acted on.

Q. Precisely; but the question which Judge Barnes asked you and which I am now examining you on is this, as to whether or not (interrupted)——

By Mr. BARNES: He stood for the Government, and he said he notified the entrymen that they would have to come in with the money or the proof would not be passed on; he stands for the Government.

By Mr. JEFFORDS: The question I have asked, and it is cross-examination upon your question, is as to whether or not he had had any instructions on the subject or whether he was acting under what he believed to be the law himself, simply.

By Mr. BARNES: If that is the question, we have no objec-
172 tion.

By the WITNESS: I was acting under what I believed to be the law.

Q. Without instructions on the subject?

A. Exactly. I could not pass the proofs unless I had received the money from some source to pass them. Simply the business of the office was blocked as far as those proofs were concerned.

By Mr. JEFFORDS: That is all.

Recross-examination:

Q. And, as you understood it, it is only by authority of letter M that you are relieved from liability for these amounts?

By Mr. JEFFOR-S: That is immaterial.

By the COURT: Yes; I think so.

A. Simply obeying instructions of that letter, and they stand between us and any loss.

Q. The entries made under that letter, when entered on the books here, stand to you, as receiver, as cash?

A. Well, the instructions of that letter are that the work was to be credited to Fred. W. Smith, and the returns were made out
173 by me as work done by him, and that is the way they are dated.

Q. That is the way you accounted for the amounts mentioned in the various receipts issued under that letter by virtue of that authority?

A. Yes, sir.

By Mr. AINSWORTH:

Q. I will ask you if there was a standing order from the Secretary of the Interior or Commissioner of the Land Office to your office and all other land offices not to pass on any proof unless the money accompanied the proof at the time the receiver passed on them.

A. Yes, sir.

By Mr. JEFFORDS: To that we object and ask that it be stricken out.

By Mr. BARNES: We insist on the answer standing.

By Mr. JEFFORDS: If there is any such order as claimed by counsel, it is a matter for the court to take judicial notice of and not the subject of testimony by a witness.

By the COURT (after argument): It seems to me immaterial whether he had knowledge of the instruction or not. If it was there in the shape of a letter, that could be produced and
174 shown. I will sustain the objection, and the answer will be stricken out.

By Mr. AINSWORTH: To which we except. That's all, Mr. Drake.

HERBERT BROWN, a witness called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. JEFFORDS:

Q. Mr. Brown, I will ask you about final desert entry No. 765, John W. Dorrington.

A. The desert-land books are not here, but I know the money was repaid in the case and paid by Mr. Dorrington.

By Mr. BARNES: We object to the use of the word "repaid."

Q. What position do you hold?

A. Register of the land office.

Q. Here at Tucson?

A. Yes, sir.

Q. How long have you been such register?

A. Since the 17th of July, 1889.

Q. Who was the receiver of public moneys at that time?
175 —. Fred. W. Smith.

Q. Where was Mr. Dorrington's proof?

A. It was in the land office.

Q. At the time you entered the land office?

A. That I am not sure, whether it was in the land office when I went into office or whether it was made in the first six months following the time I went in.

Q. Do you know whether it was at the time Mr. Drake entered the office?

A. It was in the land office then.

Q. Had action been taken on the proof?

A. Of that I am not certain; I had passed myself on proofs that Mr. Smith told me he had the money on (interrupted)——

By Mr. BARNES: We object to what Smith said about it.

By the COURT: Yes.

By Mr. AINSWORTH: Smith is not a party to this action, except nominally, and what he said cannot bind these sureties; it would be hearsay.

By Mr. JEFFORDS: It is not hearsay, and any admission of the principal would bind the sureties in a case of this kind.

By the COURT: It does not refer to this particular entry, so the answer will be stricken out as to that part of it that is not before the court.

176 Q. I will ask you as to this particular entry, Mr. Brown, of Dorrington's, whether or not you passed on the proof there.

A. As to this particular entry, I am not positive; but, if the court will allow me, I will state why I said so; that I passed upon proofs on which Smith had the money.

By Mr. AINSWORTH: No; it is not in the case; it is stricken out.

By the COURT:

Q. Do I understand the witness to say that he doesn't remember about this?

A. As to this particular case, no, si-

By Mr. JEFFORDS (resuming):

Q. Is there anything in your office from which you can testify as to this particular case?

A. No, sir; there is not.

Q. Not from your books or anything of that sort?

A. Not as to when the proof was made.

Q. As to whether you passed on it or not.

A. Not prior to the time it was entered on the books.

Q. Had the proof been made—completed?

A. It had.

Q. And final receipt issued, do you know?

A. It has.

177 By Mr. AINSWORTH:

Q. When?

A. Subsequent to the time when Mr. Drake took office.

Q. Haven't you the books here (interrupted)——

A. No, sir; I have not, but I will have them here in a moment.

(After a short intermission books were brought into court and placed near the witness.)

Q. Now, when was the proof made in that case?

A. The final proof was passed January 10th, 1890.

Q. Passed January 10, 1890?

A. Yes, sir.

Q. By whom?

A. By myself and Mr. Drake.
Q. How much was paid you?
A. $640.
Q. By whom?
A. John W. Dorrington.
Q. Paid to you and Mr. Drake?
A. Paid to Mr. Drake.

By Mr. JEFFORDS (resuming):

Q. The money was paid to Mr. Drake?
A. Yes, sir.
Q. Do you know that of your own knowledge?
A. No, sir; but the books show it and I passed upon no proof. I issued certificate on no proof until I know the money is paid.

By Mr. BARNES:

Q. Now, right there I would like to ask a question. It appears here that proof was passed on by you and Mr. Drake. Now,
178 what do you do? Do you give a certificate or something of the kind that the proof is passed on as register?
A. I issue my certificate that goes to the General Land Office; Mr. Drake issues final receipt that goes to the claimant.
Q. And they are simultaneous?
A. Yes, sir; they are of even date.
Q. Well, at that time, if any inspection of the proofs you pass on show any irregularity, you do not issue your certificate?
A. Neither would he issue final receipt.
Q. And up to that time the whole question is an open one? It can be rejected and you can call for more proof, if — is required, can't you, under the procedure of the department?

By Mr. JEFFORDS: That is objected to as calling for matter of law. It calls for the opinion of the witness. As to what their custom is, it is irrelevant, immaterial, and incompetent, and I make that objection; as to what they could do and what they ought to do is matter of law and matter of which this court would take judicial knowledge.

By the COURT: I think the inquiry should be restricted to what they did.
179 You may ask the witness with reference to anything they did in connection with these entries, but as to what may have been their duty under the law I think that is a question of law.

Q. Now, as a matter of fact were not some of these cases at the time you came to pass on final proof found to be irregular and rejected?

By Mr. JEFFORDS: I object to the form of the question, "some of these cases."

By the COURT: You may answer that question.

Q. Some of these very cases testified about here?
A. I think I rejected one final proof.

Q. Yes; but you looked into them so as to determine the question whether you should reject them or not?

A. If the proof was not regular, I couldn't enter it.

Q. That was true as to every one of these cases, wasn't it?

By Mr. JEFFORDS: I object to the form of that question.

Q. Didn't you look into every one of them to see whether the proof contained such facts as would enable you to pass on them, every one of these cases included in these statements and in which final proof was passed on by you and Mr. Drake and final
180 receipts issued by him? I confine it to these cases included in these statements.

By Mr. JEFFORDS: I haven't any objection to that.

Q. As to them did not you look into the proofs to see whether they were regular or not at the time you passed on them and at the time final receipt was issued?

A. Yes, sir.

Q. And if they were found regular you passed on them, and if they were not you rejected them, didn't you?

By Mr. JEFFORDS: That is objected to.

A. No, sir.

Q. You say you did reject one?

A. Yes, sir; I did.

By Mr. JEFFORDS: One moment. I have an objection. You say if they were regular he rejected them, and if not he passed them. The question now is, Which ones were passed?

By the COURT: Yes; you may ask as to which were passed and which were not passed.

A. To my recollection they were all passed with the exception of one.

By Mr. BARNES: That was found irregular?

By the WITNESS: Yes, sir.

Q. And the reason the others were passed was because they were found regular, wasn't it?

A. Yes, sir. At the time they were examined, if not found
181 regular, the deficiency was called for.

Q. Further proof was called for?

By Mr. JEFFORDS: It seems to me if they are entitled to go into this matter at all the particular cases ought to be pointed out and examined about.

Q. What do you mean by "the deficiency being called for"?

By Mr. JEFFORDS: I have objected to that.

By the COURT (after argument): You may ask him as to any fact that occurred in the land office relative to these entries. It is only material to show that this money was paid on behalf of or in consideration of land and was accepted by the Government in that behalf, and the proof of that is the issuance of final receipt. It can only go to show that payment was made and accepted by the Gov-

ernment, and that it therefore became public moneys, and therefore only such facts as bear on that question are material.

By Mr. BARNES: We want to show that passing on these proofs was not a mere ministerial act; that they were passed on as regular or the parties were called upon to make further proof to meet the irregularity.

182 By the COURT: It does not seem to me to be material after the issuance of final receipt. If final receipt be issued, it does not make any difference, because I consider that a payment and an acceptance by the Government.

By Mr. BARNES: That is our vies, that the only evidence of payment is the final receipt.

By the COURT: I do not say it is the only evidence, but it certainly is competent evidence of the fact.

By Mr. BARNES: We insist the letter M entries, so called, are not final receipt, and therefore we insist upon all of the facts connected with the letter M entries.

By the COURT: I think the objection that it is too general is a good one, and you had better put your questions as to particular entries. Proceed.

By Mr. JEFFORDS (resuming):

Q. 331, desert-land entry, final—no original; Lawrence Russell.

A. Yes, sir; no final receipt has issued.

Q. Is proof taken?

A. Yes, sir.

Q. Is it in the office now?

A. Yes, sir.

Q. When was it taken?

A. I don't know, sir.

183 Q. Was it taken before you went into the office?

A. Yes, sir.

Q. And before Mr. Drake was receiver?

A. Yes, sir.

Q. Why was the proof not passed on in that case?

By Mr. BARNES: That is objected to.

By the COURT: Objection sustained.

Q. Is proof in the office now?

A. Yes, sir.

Q. Has the money been paid on it?

By Mr. BARNES: That is objected to; he says no receipt has issued.

By Mr. JEFFORDS: As I understand the ruling, it is that the issuance of receipt is conclusive evidence. Now, we wish to show that proof is taken and the money paid in this case; that the proof is in the hands of the register and receiver or in the office, and that the register and receiver are directed to pass that proof, if the proof itself is complete and all right, and that in any event they are directed to issue final certificate and final receipt without the payment

of more money; and we wish further to show that Mr. Smith received the money on that entry.

By Mr. BARNES: We certainly object, because final proof
184 may be rejected entirely. It is a pending matter, and the entryman can cancel his entry or relinquish it of his own act.

By Mr. JEFFORDS: We can show the proof to be in the office.

By Mr. BARNES: I will ask the witness if I file a relinquishment if I haven't the right to draw down my money.

By Mr. JEFFORDS: I object.

By the COURT (after argument): If the money is paid in and accepted that is an end of it. The proof sought to be introduced here is that by authority of letter M the officers are instructed or authorized to issue final receipt, and hence it is payment and acceptance of the money. If the Government has estopped itself from ever rejecting that final proof by bringing this suit for the purchase-money, that would be true, if it amounts to an admission of the contract and acceptance of the offer. You may pass over this particular entry now and I will reserve decision until later.

By Mr. JEFFORDS (resuming):

Q. Desert land entry 498, Mr. Brown.

A. I have it.

185 Q. Is the proof in the office in that case?

A. Yes, sir.

Q. When was it taken?

A. I don't know.

Q. Do you know whether it was there when you went into the office?

A. No, sir; I do not.

Q. Was it there before Mr. Drake went into office?

A. No; it was sent up from Mr. Smith's house (interrupted)——

By Mr. AINSWORTH: That is objected to.

Q. Where was it, if you know?

A. It was brought to the office by Mr. John Martin, who stated to me that he received it (interrupted)——

By Mr. AINSWORTH: No; we object to what he said.

Q. It was brought to the office to you?

A. Yes, sir; and given to me.

Q. By whom?

A. Mr. John H. Martin.

Q. This Mr. Martin, the attorney here?

A. Yes, sir.

Q. And as to where it came from, you do not know?

A. Of my own personal knowledge, no.

Q. Were there any endorsements upon it?

A. There is now.

Q. Was there at the time it was given to you?

A. None.

Q. No endorsements on the back of the paper at all?
A. None; no, sir.
Q. Do you know whether or not, of your own knowledge, Mr. Smith ever received any money on that entry?
186 A. I do not.
Q. Does the proof in any way show whether he had or not?
A. No, sir.

By Mr. AINSWORTH: That is objected to.
By the COURT: Yes.

Q. I don't care for it, anyhow. It is admitted the money was received.

By Mr. AINSWORTH: No certificate was issued on this.

Q. Has any final receipt been issued on this?
A. No, sir.
Q. Has the proof been passed on in any way?
A. No, sir.
Q. 496, Jacob R. Haigler.
A. Yes, sir.
Q. Is the proof in the office in that case?
A. Yes, sir.
Q. Was it in the office when you went in?
A. No.
Q. When did it come there?
A. I think it was last August.
Q. Last August?
A. Yes, sir.
Q. Before whom was it taken?

By Mr. AINSWORTH: That is since this action was brought, and we object.

A. It was delivered to me by Mr. John Martin.
Q. It was brought to you by Mr. John Martin?
A. Yes, sir.
187 Q. The same gentleman who brought the former proof?
A. Yes, sir.
Q. Are there any endorsements upon it?
A. Yes, sir.
Q. What are they?

By Mr. AINSWORTH: That is objected to as not the best evidence.
Objection sustained.

Q. Will you produce that final proof?
A. I can do —; yes, sir. The endorsements are all of my own making.
Q. Were there no endorsements on it at the time you received it?
A. No, sir.
Q. At the time Mr. Martin handed it to you?
A. Not any.
Q. Do you know whether any money was paid on it or not?

A. I do not.
Q. 394, Mr. Brown.
A. Yes, sir; I have it.
Q. Is the proof in the office in that case?
A. I believe it is in the General Land Office.
Q. Has it been passed upon?
A. No, sir.
Q. Do you know whether it is in the General Land Office?
A. Yes, sir; it was sent up to the General Land Office for an opinion on it.
Q. On the proof itself?
A. Yes, sir.

Q. Do you know whether any money was received on that
188 entry?

By Mr. AINSWORTH: That is objected to.
By the COURT: Objection overruled.

A. I do not know personally.
Q. Do you know whether there are any books or entries in the office?
A. That would show it?
Q. Yes, sir.
A. No, sir; it is not on the final proof.
Q. It is not on the final proof?
A. No, sir—that is, the final proof is not on the books.
Q. Well, have you any means of knowing, Mr. Brown, whether or not any money was paid on that entry?
A. The final proof has the money marked on it by Mr. Smith (interrupted)——

By Mr. BARNES: We object to that and ask that it be stricken out.
By the COURT: Yes; it may be stricken out.

Q. State whether or not you have any means of knowing whether money had been received by Fred. W. Smith upon any of the entries or final proofs in the office at the time you went in there, and this one in particular.

By Mr. BARNES: That is objected to because he says he don't know anything about this and it would be purely hearsay and too general.

189 By the COURT: You may ask him as to his knowledge of this case; whether he knows or not.
By Mr. BARNES: He has answered and says he don't know.

By Mr. BARNES:

Q. Do you know whether or not, of your own knowledge, whether any money was received on it at all or not?
A. I know by authority of Smith.
Q. Of your own knowledge?

By Mr. JEFFORDS: I object.

By Mr. JEFFORDS (resuming):

Q. Of your own knowledge or from what Smith told you while he was receiver of public moneys?

By Mr. BARNES: We object to what Smith told him.

By the COURT: The objection to that will be overruled.

By Mr. AINSWORTH: It wasn't in the office.

By the WITNESS: Yes: it was.

By the COURT: I think the admission of the receiver while in office binds the bondsmen.

By Mr. AINSWORTH: We take an exception to that ruling. He may charge us with fifty thousand dollars and cannot bind the bondsmen unless it be true.

By the COURT: No; I do not think that any admission is conclusive.

190 By Mr. AINSWORTH: If this went in, it would have to be taken as an admission that it was public moneys. The whole admission would have to go in and not piecemeal, I suppose?

By the COURT: Oh, anything he may have said about it might be taken as an admission as far as it went. What is the question?

Q. (The reporter read the question as follows:) Of your own knowledge or from what Smith told you while he was receiver of public moneys, do you know whether any money was received on it at all or not?

A. When examining final proofs, Smith told me I could always tell when he had the money on final proof (interrupted)——

By Mr. BARNES: That is objected to, and we ask that it be stricken out.

By the COURT: Let him tell us what Smith told him.

By the WITNESS (continuing): And then he showed me his mark on the proof. He had a private mark, and also in addition to that the amount of money received by him was written on the outside of the proof, and whenever the money was received on the proof and I took it up for action and found it regular it then went on the books, because the money had been paid. That was my ab-

191 solute knowledge from him that the money had been paid.

Q. That he had a private mark on the proof and the amount of money?

A. Yes, sir.

Q. Was that written in characters?

A. Written in figures.

By Mr. BARNES: I object to this as evidence of what was the custom of that office, and Mr. Jeffords insists that we have nothing to do with that. If it goes on, I want the privilege of showing further procedure on this subject.

By the COURT: No; it is hardly matter of procedure, but matter between Mr. Brown and Mr. Smith as to what Mr. Brown might infer from certain marks on the papers.

Q. Well, in examining that proof, what did you find?

By Mr. BARNES: We object to that because it is not the best evidence.

By the COURT: Objection sustained.

Q. 288, Mr. Brown—William H. Duryea.
A. Yes, sir.
Q. Final receipt issued in that case?
A. Yes, sir.
Q. When was it issued?
A. November 25, 1890.

Q. By whom was it issued?

192 A. By authority of letter M, April 30th.

Q. Do you know whether any money was received on that entry or not?
A. No, sir.

By Mr. BARNES:

Q. You don't know?
A. No. I say from my general understanding that there was no money in those matters.
Q. How do you know there was no money?
A. That there was no money?
Q. Yes, sir.
A. Because Mr. Drake said he hadn't.
Q. And the procedure of the office shows you there was no money paid at the time?

By Mr. JEFFORDS: I object to the question of procedure.
By Mr. BARNES: Then I ask to have his answer stricken out.
By the COURT: Ask him how he knows.
By Mr. JEFFORDS: I admit that he does not know.
By Mr. BARNES: Then I want his answer stricken out.
By the COURT: Yes; if he don't know, it ought to be stricken out.

Q. Who passed on final proof, and when, preparatory to issuing final receipt?
A. Passed on by myself and Mr. Drake, Nov. 25, 1890.

By Mr. AINSWORTH:

193 Q. Anything lacking in that proof that you had to have supplied?

By Mr. JEFFORDS: I object to that as immaterial. Final receipt issued.
By the COURT: Yes. Objection sustained.

By Mr. JEFFORDS (resuming):

Q. 717?
A. John T. Alsap.
Q. Has final certificate ever been issued in that case, Mr. Brown?
A. Yes, sir.
Q. When was it issued?

A. November 25, 1890.
Q. Do you know under what authority?
A. Letter M.
Q. That is all you do know about that?
A. Yes, sir; that is all.

By Mr. BARNES:

Q. By whom and when was it issued?
A. By Mr. Drake and myself.
Q. Preparatory to that final receipt?
A. Yes, sir.
Q. By you and Mr. Drake?
A. Yes, sir.
Q. When?
A. November 25, 1890.

By Mr. JEFFORDS: It is about the hour of adjournment and we will have to send for other books.

By the COURT: Yes; we will take an adjournment till half past one, and the jury will bear in mind the admonition of the court as before.

194 (Recess 11.50 to 1.30.)

By Mr. JEFFORDS (resuming):

Q. The next is commuted homestead 969, Benjamin F. Johnson.
A. Yes, sir.
Q. Has final receipt been issued in that case?
A. Yes, sir; it has been issued.
Q. When was it issued?
A. June 10, 1890.
Q. Under what authority?
A. Cash was paid.

By Mr. AINSWORTH:

Q. How much?
A. Counting the fees, ten dollars.
Q. Was that paid at the time?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. The entry was commuted to cash?
A. Yes, sir—no, excuse me; it was on final homestead. I will state that proof was originally made as pre-emption, but the man stated through his attorney, Mr. Kingsbury, of Tempe, that he wasn't able to repay the money, and (interrupted)——

By Mr. BARNES: That we object to.

By Mr. BARNES:

Q. He did make a homestead entry?
A. Yes, sir.

Q. And proved upon it?
A. Yes, sir.

By Mr. JEFFORDS:

Q. And paid the money for the homestead?
A. Yes, sir.
195 Q. Did he pay the money for the pre-emption?

By Mr. BARNES: Q. That is objected to because the pre-emption was cancelled and wasn't completed.
By the COURT: Objection sustained.
By Mr. JEFFORDS: We except.

Q. 771 Frank G. Blaisdell.

By Mr. BARNES: That was inquired about on Saturday. It was a cash entry.

A. It was a cash entry, yes, sir: 771.
Q. Homestead 624, Frederick W. Smith.
A. Yes, sir.

By Mr. BARNES:

Q. Did he beat himself out of some money?
A. No; that happened to be a man of exactly the same name.

By Mr. JEFFORDS (resuming):

Q. Has final receipt issued in that case?
A. Yes, sir; Dec. 24, 1890.
Q. Under what authority was it issued?
A. Cash.

By Mr. AINSWORTH:

Q. How much?
A. Ten dollars.

By Mr. JEFFORDS (resuming):

Q. Do you know whether cash was paid or not?
A. His administrator wrote to the office to that effect.
196 Q. When was the final receipt issued in this case?
A. Dec. 24, 1890.

Q. Was any money paid upon that entry to Mr. Drake, do you know?
A. Yes, sir.
Q. You know that of your own knowledge?
A. Yes, sir.
Q. How much?
A. Ten dollars.
Q. How much was due the Government on it?
A. Ten dollars.
Q. 1194, Hiram S. Stevens. Was final receipt and certificate issued in that case?
A. Yes, sir.
Q. When were they issued?

A. March 22, 1890.
Q. Under what authority?
A. The money was paid.

By Mr. AINSWORTH:

Q. How much?
A. I think eight dollars; six or eight, I am not sure which.

By Mr. JEFFORDS (resuming):

Q. 381, homestead, John L. Story.
A. That is final homestead entry.

By Mr. BARNES:

Q. It wasn't under letter M?
A. No.

By Mr. AINSWORTH: That has been gone over.

By Mr. JEFFORDS (resuming):

Q. 1158, homestead, James Quinlan. Has final receipt been issued in that case?
A. Yes, sir.
197 Q. What is the date?
A. December 16, 1889.
Q. By what authority?
A. The money was paid.

By Mr. AINSWORTH:

Q. How much?
A. Ten dollars.
Q. Was that all that was due the Government?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. 1416, declaratory statement.
A. Yes, sir.
Q. Final certificate issued in that case?
A. Jesus Vialobos?
Q. Yes, sir.
A. That in the land office.

By Mr. BARNES:

Q. That is not passed on yet; it is on appeal there?
A. Yes.

By Mr. JEFFORDS (resuming):

Q. Has it been passed on by this office?
A. Yes.
Q. A contest over it?
A. Yes, sir; by the Government against the entryman. The charge is the entryman made it in the interest of another man.

Q. Final proof taken on that entry?
A. Yes, sir.
Q. Where was it at the time you went into office?

By Mr. BARNES: That is objected to as immaterial.
By the COURT: Objection sustained.
By Mr. JEFFORDS: We except.

Q. 1005, Freeman T. Powers.

198 By Mr. AINSWORTH: We have had that.

Q. Desert land entry 1554½.
A. Yes, sir.
Q. What is the situation of that entry?
A. It is an original entry, Francis H. Hill. It was put on the books by authority of letter M.
Q. Do you know whether or not Mr. Drake ever received any money on it?
A. He did not.
Q. Where was the proof at the time you went into the office?
A. Proof wasn't made; the original papers were there.
Q. Original papers?
A. Yes, sir; original application to enter.
Q. When was the original entry made?
A. October 21, 1890.

By Mr. AINSWORTH:

Q. Final proof made then?
A. No; original entry was allowed.
Q. No final proof?
A. No, sir; final proof never was made.
Q. No final receipt passed?
A. No final proof. It is an application made to enter the land.

By the COURT:

Q. What sort of an entry is it?
A. Desert land entry, and the application was in the land office, but hadn't yet become a record at the time Mr. Smith went
199 to—went out of office.
Q. Was the original receipt issued?
A. Not at the time; it was issued subsequently.

By Mr. JEFFORDS:

Q. Under authority of letter M?
A. Issued October 31, 1890, and put on the books under authority of letter M.

By the COURT: The objection will be overruled.
By Mr. BARNES: We save the point.

Q. What was the amount?
A. 878.39.
Q. Now, 1676½, Isabel A. De Haas. Final receipt issued in that case?

A. No, sir; same as Francis Hill.

By Mr. BARNES: Same objection, then.
By the COURT: Yes; same ruling.
By Mr. BARNES: We except.

Q. How much money was due?
A. Forty dollars. The date of the entry is Nov. 25, 1890; that is the date it became a record.
Q. And how much was due the Government there?
A. $40.

By Mr. AINSWORTH:

Q. Any contest against that one?
A. No, sir; it was a contest of itself of another entry; there was no contest of it.

By Mr. AINSWORTH: Then we object to it.
200 By the WITNESS: It is allowed.

By the COURT:

Q. And receipt issued?
A. Yes, sir.

By Mr. BARNES:

Q. Final receipt?
A. No; original receipt.
Q. Is contest ended?
A. Yes, sir.
Q. And all disposed of?
A. Yes, sir; yes; otherwise it would not have been on the record.

By the COURT: Objection overruled.
By Mr. BARNES: This is testifying again about the procedure of the office.
By the COURT: Oh, no; this is telling about this particular transaction.

By Mr. JEFFORDS (resuming):

Q. 1413, homestead.
A. Adolphus H. Noon.
Q. Final receipt issued in that case?
A. Yes, sir.
Q. What date did it issue?
A. September 19, 1890.
Q. By whom was it issued?
A. By myself—that is, final receipt issued by Mr. Drake and certificate by myself.
Q. Under what authority?
A. He paid the money.

By Mr. AINSWORTH:

Q. How much?
A. Ten dollars. That is an original entry.

By Mr. JEFFORDS (resuming):

201 Q. It was an original entry and the money paid?
A. Final proof has been made upon it.

By Mr. BARNES:

Q. But not passed on?
A. Yes, sir; but the contest money is original entry—$16.
Q. But receipt has not passed?
A. Yes, sir; it has.
Q. Final receipt?
A. Yes, sir; but it is not $16 on final proof.

By Mr. JEFFORDS (resuming):

Q. 2039, declaratory statement.
A. Alme Kerby.
Q. Has final receipt been issued?
A. Yes, sir; it has. Final proof is in the land office.
Q. Passed on?
A. No, sir.
Q. Final certificate not issued?
A. No, sir. This is an entry I would not be positive about, but I can tell by looking in the land office a minute, if you will allow me.
Q. We would like to know, Mr. Brown. Wasn't this entry charged to homestead?
A. Kerby's?
Q. Yes, sir.

By Mr. BARNES:

Q. In that connection I would like to ask if their right to
202 change their entry from a homestead to pre-emption, or otherwise, is not recognized—to change their entries by relinquishment.
A. If a man has a pre-emption and wishes to file a homestead over it he is privileged to do so, or any one may file a homestead over a pre-emption. I know Kerby made final proof.
Q. Take it as land entry; can't the entryman relinquish?
A. A desert-land entry? Yes, sir; can relinquish it absolutely.
Q. Any time before final proof?
A. Yes, sir; any time before final proof.

By Mr. JEFFORDS: May it please the court, as matter of testimony, I don't think the witness can testify to it. It is a matter the court can regulate by instructions to the jury.

By the COURT: I can't see that it comes into the case at all, and therefore no instruction is necessary.

By the WITNESS: Here it is; original homestead was filed over the pre-emption.

Q. By whom?
A. By Mr. Kerby himself.
Q. Kerby filed a pre-emption first?
A. Yes, sir.

Q. And then filed an original homestead?
A. Yes, sir.
Q. Did he pay the money on his pre-emption?
A. Yes, sir.

203 By Mr. AINSWORTH:

Q. Do you know that?
A. He made an affidavit at the office.

By Mr. AINSWORTH: We object to that.
By the COURT: Objection sustained.

By Mr. JEFFORDS (resuming):

Q. Has final receipt been issued on the homestead?
A. No, sir.
Q. The papers, then, haven't been passed on?
A. There has been no final proof made on the homestead. The homestead is an original entry.

By Mr. JEFFORDS: I will state to the court that, as in the case of the last transcript, I offer to prove by this witness that in all these cases which have been testified to here, where cash had been paid in this supplemental abstract, that the entryman paid the money necessary to secure the portion of the public lands for which they had applied to Fred. W. Smith, as receiver of public moneys at Tucson, and I avow that we can make such proof.

By Mr. AINSWORTH: We make the same objection as before.
By the COURT: The objection will be sustained.

204 Q. Mr. Brown, how long were you in the land office with Fred. W. Smith, the late receiver?

A. I assumed the duties of register July 16th or 17th, 1889, and I think Mr. Smith turned over the office December 3, 1889.

Q. Now, coming down to the customs of the office as Judge Barnes did, do you know what the custom of Mr. Smith was, when final proof would come in to him or when entries were being made, as to whether or not he demanded the money upon the final proof or the entries?

By Mr. AINSWORTH: We object to that as irrelevant and immaterial. It is not a question of demand, but whether it was paid or not.

By the COURT (after argument): It was agreed, as I understood, that these several sums were paid to Smith, and it seems to me that nothing further is necessary than the proof that the Government accepted that as payment of their lands. If the Government has accepted that as payment and ratified the act, even though irregular, as I have held before, I think that is sufficient. I think the Government can recover for such moneys, and it makes no difference whether Smith demanded it or not. If the money was
205 paid for the purpose of obtaining title to land and the Government accepted it, in my view it then became public moneys for which the sureties are liable, and in that view it does

not make any difference whether he demanded it or not. It may make a stronger case against Smith, perhaps, on a criminal proceeding where the question of intent enters, but in a civil suit I can't see that it makes any difference. The objection is sustained to that line of testimony.

By Mr. JEFFORDS: We except to the holding of the court. Take the witness.

By Mr. AINSWORTH: I have no questions.

By Mr. JEFFORDS: Now, I should like to have the court pass upon the point reserved.

By the COURT:

Q. Were these instructions with reference to these particular cases?

A. I don't understand.

Q. The instructions with reference to the issuing of receipts—general instructions, were they? I want to know whether the instructions were special or by authority of letter M.

206 A. Everything was done by letter M; no special instructions at all in any case. If a case was referred to the land office for any purpose, it was passed upon under that letter.

By the COURT: Well, I think, as to those, suit would be premature as to those items, and the objection will be sustained.

By Mr. JEFFORDS: We except to the holding of the court on that.

CHARLES R. DRAKE recalled by the Government.

Further direct examination.

By Mr. JEFFORDS:

Q. Desert-land entry No. 288.

A. Final or original?

Q. Original; William H. Duryea. Did you issue the final receipt in that case?

A. Original or final, do you mean?

Q. Final.

A. No, sir.

Q. Final, I say.

A. Oh, yes, sir; I did.

Q. Under letter M?

A. Yes, sir.

Q. Did you receive any money on that entry?

A. No, sir.

Q. Was proof in the office when you went into it?

A. No, sir.

By Mr. MARTIN:

207 Q. Who passed on final proof preparatory to issuing of final receipt?

A. Mr. Brown and myself.

Q. What was the date of final proof—final receipt?

A. November 25, 1890.
Q. How much was due the Government on that entry?
A. The final payment—eighty dollars.

By Mr. JEFFORDS (resuming):

Q. John Alsap, 717. Who issued final receipt in that case?
A. I did, November 25, 1890.
Q. Any money paid to you on that entry?
A. No.
Q. Where was proof when you entered the land office?
A. In the land office; well, I don't remember whether it was or not, or whether it was sent up from Mr. Smith's house afterwards.
Q. How much was due the Government on that?
A. $320.

By Mr. AINSWORTH:

Q. Who passed on it?
A. Mr. Brown and myself.
Q. At that date?
A. Yes, sir.

By Mr. JEFFORDS (resuming):

Q. 1554½.
A. Francis H. Hill.
Q. Was final receipt issued by you in that case?
A. Original receipt was; it is not final.
208 Q. Was any money paid to you?
A. No.
Q. Under what authority was the receipt issued?
A. Authority of letter M.

By Mr. AINSWORTH: That is not under this letter M.
By the WITNESS: The letter M does not cover any of these cases—that is, they are not enumerated. This is a supplemental abstract.
By Mr. AINSWORTH: I know, but this says "final proof, accompanied by a list."
By the WITNESS: Well, the original papers were put in there ready to be passed on that had not been passed on up to our coming into office and were entitled to the same status as final proofs were.
By Mr. AINSWORTH: This letter (M) does not so say; it refers to particular ones.
By the WITNESS: There was a supplemental account after that.
By Mr. AINSWORTH: But that letter does not cover anything but the accounts attached to it, it says.
By the WITNESS: I know; but there is a supplemental letter to letter M.
By Mr. AINSWORTH: That supplemental letter does not so say, either.
209 By the COURT: Proceed; you can discuss the letter afterwards.

By Mr. AINSWORTH: This entry does not seem to be covered by this second letter, either.

By Mr. JEFFORDS: Make your objection and we will see.

By Mr. AINSWORTH: Well, we object, because it is not covered by letter M; it is not on the list accompanying letter M.

By the WITNESS: An original receipt has been issued.

By Mr. AINSWORTH: But they say it is under letter M, and we say it is not in the list accompanying letter M.

By Mr. JEFFORDS: As a matter of fact, there is another letter in the office, which has been sent for. There are two or three letters running back to initial M.

Q. It is the initial used by the department; is not that so, Mr. Drake?

A. Yes, sir.

At this point Mr. Jeffords asked an adjournment until tomorrow morning to enable him to offer the letter in question, and also the order of the President increasing the penalty of the bond of
210 Mr. Smith as receiver, which latter document was not in his possession, but which he expected on the arrival of the next mail from Washington, with the exception of which letters he was through with his case.

By Mr. JEFFORDS: I have here now the letter I referred to. This objection arose on the case of Hill, and this letter instructs the officers here to allow that particular entry.

By Mr. BARNES: We make the same objection to it as will be urged to letter M. The statute authorizes heads of departments to make rules and regulations governing their department, but we insist they are limited by that statute, and that they have no right after a bond has been executed and after the man is inducted into office to make special rules for particular cases. That is not a general rule; it is a rule in violation of a general regulation. (Counsel continued at length.)

By the COURT: I think the Land Department has a right to change the rules and regulations so far as they appertain to the duties of registers and receivers, because to hold otherwise would
211 simply be to hold that every time a new rule was made in the department a new bond would be required of the register and receiver, which, of course, would be an absurd construction to put on it, and I regard this as a question of law outside of the rulings of the department that this does not become public moneys simply from the rule of the department, but by the broad principle that he who pays money for a particular object to another—who receives and accepts it as a payment—that it then becomes payment through an agent, and if ratified by the principal it becomes payment to the principal, and this letter M is evidence only in so far as it indicates the action of the Government, who stands in this suit the same as any person in its acceptance of the act of the entryman in paying the money to the agent as a payment to the Government. I cannot see how the rulings of the department can affect the general principal that in a case of this kind it is a payment to the

principal, and by the act of the principal in ratifying the act it becomes public moneys. The objection will be overruled.

212 By Mr. BARNES: We save the exception.

Adjourned till tomorrow morning, 9 o'clock.

TUESDAY, *February 17th*, 1891—9 o'clock a. m.

Continuation of trial pursuant to adjournment.

The court stated that he was informed that the United States attorney was ill, and that his physician had forbidden his leaving his room. After some discussion the case was continued till half past one o'clock, to which hour the jury was excused, with the usual admonition.

(Recess till 1.30.)

The court stated that he had reliable information that the United States attorney was too sick to leave his bed, which was sufficient cause for the continuation of the case for a reasonable time. After some discussion the case was thereupon continued until 9

213 o'clock tomorrow morning; to which hour the jury was excused, with the usual admonition.

Adjourned till tomorrow morning, 9 o'clock.

WEDNESDAY, *February 18th*, 1891—9 o'clock a. m.

Continuation of trial pursuant to adjournment.

By Mr. JEFFORDS: I now offer the following order of the President increasing the penalty of the bond of the receiver in this case (reading):

"WASHINGTON, *February 16th*, 1888.

"The Commissioner of the General Land Office.

"SIR: In compliance with your recommendations of the 9th inst. and Nov. 18, 1887, the penalty of the official bond of the receiver of public moneys at Tucson, Arizona, is hereby increased by direction of the President from ten thousand to thirty thousand dollars. A new bond in the latter amount will therefore be required of the present receiver.

"Very respectfully, WM. F. VILAS, *Secretary.*"

214 By Mr. AINSWORTH: We object to this as hearsay. It does not purport to be the order of the President, but Mr. Vilas's interpretation of it, and it is hearsay.

By the COURT: The objection is overruled. It may be admitted.

By Mr. AINSWORTH: We except.

(Document marked "Pl'ff's Ex. C.")

By Mr. JEFFORDS: I now offer in evidence the bond on which this suit is based.

By Mr. AINSWORTH: We object to it for the reason that the Secretary of the Interior cannot change the amount. He directs a new bond for $30,000, which is not the order of the President. Mr. Vilas himself, as Secretary and not under the direction of the President, orders the new bond for thirty thousand dollars, when the Presi-

dent's order was that the bond be increased from ten thousand to thirty thousand, and the real fact was that it was fifteen thousand.

By the COURT: Reading the whole order as it stands, I
215 think the intention of the order was to require a new bond in the sum of thirty thousand dollars. I should think the Secretary would be the best interpreter of the order of the President, whatever it was; and if his understanding was that it was to be thirty thousand I think it fair to presume that the order of the President was for a new bond of thirty thousand dollars. The reading is, "The penalty of the official bond, etc., is hereby increased by direction of the President from ten to thirty thousand dollars. A new bond in the latter amount will therefore be required." The bond will be admitted.

By Mr. AINSWORTH: To which we except.

(Bond marked "Pl'tff's Ex. D.")

By Mr. JEFFORDS: The Government rests.

By Mr. AINSWORTH: I find, in running over the list, that there are several entries that have never been called for or asked about. I simply call attention to it to know if they were omitted intentionally.

216 By Mr. JEFFORDS: I did not omit anything intentionally, and if it shows that way you may put it in yourself.

By the COURT: I would suggest that you go on with your proof, and at the noon recess an examination can be made by the Government, and if they find the money has been paid to Mr. Drake they can admit that.

By Mr. JEFFORDS: Under the ruling of the court all we can do is to admit that fact and show that the money has been paid to Smith.

By Mr. BARNES: There is a bond in the district attorney's office for fifteen thousand dollars, a copy of it. Do you admit that, Mr. Jeffords?

By Mr. JEFFORDS: I admit the bond as stated, and a copy of it is in my possession.

By Mr. AINSWORTH: You raise no question on the ground that it is not the original or a certified copy?

By Mr. JEFFORDS: Oh, no.

By Mr. BARNES: Then we offer in evidence a bond executed by Fred. W. Smith and Ellis, Norton, Hooker, and Stewart for $15,000, dated April 11th, 1887. I will read it (reading same).

217 By Mr. JEFFORDS: I object to it on the following grounds: This bond purports to have been made on the 11th day of April, 1887. It is a bond prior to the date when the penalty of Mr. Smith's bond as receiver of public moneys was ordered to be increased by the President.

On the further ground that the proof shows that all final receipts which the court holds the ex-receiver and his bondsmen would have to account for were all issued and passed upon after the giving of the new bond required by the President in the sum of thirty thousand dollars, which bond is in evidence here before the jury now.

Further, on the ground that this bond is immaterial, irrelevant, and incompetent, and that it does not meet any issue in this case.

By Mr. BARNES: This bond is introduced for two purposes: one purpose is—and to my mind the most important purpose—to show that the order of the President (if there was any such order, of which there is no evidence) is not in conformity with law or is the bond executed in conformity with the order of the President.

218 We offer this to show that the bond of the receiver was not ten thousand but was fifteen thousand dollars.

By the COURT: I do not read this order as you do. As I read it, it does not increase the penalty of the bond already in existence, but increases the statutory penalty from ten to thirty thousand dollars. I read it as ordering a new bond of thirty thousand dollars. The objection is sustained to the introduction of the fifteen-thousand-dollar bond.

By Mr. AINSWORTH: There is not a particle of evidence that any of this money was paid to Fred. W. Smith.

By the COURT: That question does not affect this bond nor is it affected by this bond.

By Mr. BARNES: The court holds this bond not to be admissible for any purpose.

By the COURT: At this stage of the case; yes, sir.

By Mr. AINSWORTH: The objection, as I understood it, was that it was immaterial and incompetent. There was no objection to the manner of proving the bond at all.

By Mr. JEFFORDS: Oh, no; the objection is there and I stand on what I gave the reporter and the court.

219 By Mr. AINSWORTH: We save the exception. We would now ask the other side to produce the letter sent to these men at the time this bond was required to be executed. We allege that it was a threat; that unless they executed the bond he would be removed from office.

By Mr. JEFFORDS: I will state that I am unable on the part of the Government to produce any letter written by Fred. W. Smith to the department or any letter written to Fred. W. Smith by the department, and that none of those letters have been in our hands. I have a telegraphic copy of the letter sent to Fred. W. Smith, sent from Washington for the gentlemen, and if they desire to have it they may. I have not the letter itself and it was not left in the Land Office. If it ever came to Mr. Smith's hands, we have no knowledge as to what became of it.

By Mr. AINSWORTH: They admit that they have in the Land Department, at Washington, a copy of that letter; and they could have produced a certified copy of it, as we demanded. If they haven't it, we will prove it by parole. We will call Col. Christy.

220 WILLIAM J. CHRISTY, a witness called and sworn on behalf of the defense, testified as follows:

Direct examination.

By Mr. BARNES:

Q. Where do you live?
A. Phœnix, Arizona.
Q. You are one of the defendants in this case?
A. Yes, sir.
Q. Did you execute the bond sued on in this case?
A. I did.
Q. Where at?
A. Phœnix.
Q. Who was present at the time?
A. Thomas F. Wilson, D. M. Wallace, and nine other defendants in this case.
Q. Was Mr. Fred. W. Smith present?
A. No; he was not.
Q. Who represented him there?

By Mr. JEFFORDS: I object.

Q. Who was there acting for Mr. Smith?

By Mr. JEFFORDS: That is immaterial and irrelevant.
By Mr. BARNES: It is merely preliminary.
By the COURT: The objection will be overruled. Proceed.
By Mr. JEFFORDS: We except.

A. Thomas F. Wilson.
Q. What were the circumstances under which you executed this bond?

221 By Mr. JEFFORDS: I object to that as entirely too general. If there is anything which they wish to prove under these defenses set up here it is competent to direct the attention of the witness to the particular facts. Under the pleadings the execution of the bond is admitted, and we say the circumstances are therefore immaterial.
By the COURT: The objection is overruled. Answer the question.
By Mr. JEFFORDS: We except.

A. What was the question?
Q. Under what circumstances did you execute this bond? Tell all the facts about it.
A. Gen. Wilson came up there with the bond and a letter from the Commissioner of the General Land Office.
Q. To who?
A. To Smith.

By Mr. JEFFORDS:

Q. Have you got a copy of that letter?

By Mr. BARNES: Wait a moment.

By Mr. JEFFORDS: I will ask to examine him on his *voir dire*.
By Mr. BARNES: I haven't asked him about it yet.
By the COURT: Proceed.

By the WITNESS (continuing): Requiring a bond from Mr.
222 Smith in the amount of thirty thousand dollars, and I am not positive as to the wording of the letter, but the interpretation put upon it by all the men that signed the bond (interrupted)——

By Mr. JEFFORDS: To that I object.
By the COURT: Yes; the objection is sustained now.

Q. As to your best recollection of what it contained? Give your best recollection of what the words were or the substance of the words.

By Mr. JEFFORDS: I object, unless he shows that he remembers it.

Q. The substance of the words, as near as you can tell it.

By Mr. JEFFORDS: The rule, as I understand, is, if they seek to prove the substance, is to prove that the witness remembers it substantially.
By the COURT: Yes, sir.

Q. Do you remember what was the substantial effect of that letter?

By Mr. JEFFORDS: I object to the form of that question.
By the COURT: Yes; not substantially the effect.

Q. I mean by "effect" the substantial meaning.

By Mr. JEFFORDS: I object to the "substantial meaning."

223 Q. Or substantially the words of the letter?

By the COURT: That is better.

Q. Do you remember, substantially, the substance of the words of that letter?
A. That he was required to give a bond (interrupted)——

By Mr. JEFFORDS:

Q. Do you remember or not?

By Mr. BARNES:

Q. Do you remember the substance of the words?
A. Yes, sir; I do.
Q. Now, state it.
A. That he was required to give a bond for that amount, and that if he didn't give it he would have to step down and out, or that he would have to surrender his office.
Q. That letter was signed by whom?
A. Stockslager, acting Commissioner, I think.

By Mr. JEFFORDS: One moment—I ask leave to examine him on his *voir dire* as to whether he is competent to testify.

By the COURT: He has given the substance of the letter, and cross-examination, I think, will answer every purpose.

By Mr. JEFFORDS: Very well.

224 Q. Signed by Stockslager as Commissioner of the Land Office, you say, or acting Commissioner, whichever it was?

A. One or the other. It was signed by Stockslager; I don't remember whether as Commissioner or acting Commissioner.

Q. And addressed to whom?

A. Fred. W. Smith.

Q. As receiver?

A. Yes, sir.

Q. Who read the letter to the gentlemen who were there, including yourself?

By Mr. JEFFORDS: That is objected to.

By the COURT: I will sustain that objection.

Q. Or was it read by anybody out loud?

By Mr. JEFFORDS: That is objectionable.

By the COURT: Yes; it is clearly leading.

By Mr. BARNES: I want to show that Gen'l Wilson, as the representative of Mr. Smith, went over there and read the letter in the presence (interrupted)——

By the COURT: The holding was that the question was leading.

Q. I will ask who read that letter to these people, or if anybody did.

By Mr. JEFFORDS: I say it is immaterial and irrelevant, and that it makes no difference who may have read the letter, if any-
225 body did, to these sureties. It makes no difference whether it was ever read to them or not; the only question under these pleadings is whether or not a bond was extorted from the principal at the peril of his office, and what representations he or his representative may have made to the sureties cannot bind the Government, because a man cannot thus be permitted to make testimony for himself.

By Mr. BARNES: That is the very thing I am offering it for, to show that it was extorted; that Gen. Wilson was there as Smith's representative, with this letter in his hand.

By the COURT (after argument at length): I cannot see that it would be competent evidence to bind the Government, and I will sustain the objection.

By Mr. BARNES: We will save the point.

Q. Who showed you the letter?

By Mr. JEFFORDS: I object.

By the COURT: Oh, he has testified to the contents, and he may state the circumstances under which he saw it.

Q. Who showed you the letter?

A. Thomas F. Wilson.

Q. Where was the bond which you signed at the time?

226 By Mr. JEFFORDS: That, I submit, is immaterial.

Q. Was that at the same time you signed the bond?

By Mr. JEFFORDS: I object.
By the COURT: Objection overruled.

A. It was the same time—the same day.

By Mr. JEFFORDS: I except to the holding of the court.

Q. This letter was shown to you and read by you at the same time you signed the bond?
A. Yes, sir.
Q. How many of these other parties signed the bond at that time?

By the COURT: I think that comes within the ruling heretofore made. The objection will be sustained. I think the evidence as to that letter is competent and as to its contents.

Q. At the time that letter was read by you, you then signed the bond?

By Mr. JEFFORDS: That is objected to.

Q. Did you know the contents of the bond before you signed the bond?

By Mr. JEFFORDS: I object to that; there is no allegation of fraud or mistake.
By the COURT: Objection sustained.
By Mr. BARNES: We save the point.

227 Q. Did those gentlemen all know the contents of the letter before they signed the bond?

By Mr. JEFFORDS: That is objected to.
By the COURT: Objection sustained.

Q. At the time this letter was read over there had Mr. Sabino Otero or Mr. Samaniego signed this bond?

By Mr. JEFFORDS: I object.
By the COURT: Sustained.

Q. Were Samaniego and Otero there at the time the bond was signed?

By Mr. JEFFORDS: That is objected to.
By the COURT: Sustained.

Q. Who were the nine persons you have mentioned in your answer heretofore?

By Mr. JEFFORDS: I object.
By the COURT: Objection sustained.

Q. Mr. Christy, do you remember about the time Mr. Smith went out of office?

By Mr. JEFFORDS: I object as immaterial.
By the COURT: Oh, that is preliminary, answer it.

A. I do.

Q. Were you in Tucson about that time?

A. I was in Tucson at that time.

228 Q. At that time?

A. Yes, sir.

Q. Now, was Smith here then, about the time you came over here first, about the time he went out?

A. He was here when he went out of office.

Q. Yes; now, who was here, if anybody, as an agent of the Land Department?

By Mr. JEFFORDS: That is immaterial.

Q. If anybody.

AINSWORTH: It is simply preliminary; the Land Department is part of the Government.

By the COURT: Answer it. It is preliminary and it can't prejudice anybody.

Q. Who was here?

A. Mr. Harlan, inspector of the Land Office.

Q. What was he doing here at that time, if you know?

A. He was settling with Fred. W. Smith, receiver.

Q. Did you have any conversation with him as to the condition of Mr. Smith's accounts?

By Mr. JEFFORDS: I object to that. Mr. Smith's accounts go in and are adjusted by the Treasury Department, and the accounts of receivers are to be certified by the Commissioner of the Gen-

229 eral Land Office to the Treasurer, and the fact that an inspector was here and may have had a conversation with Col. Christy as to Mr. Smith's accounts is immaterial one way or another, because he is not the adjusting and accounting officer.

By Mr. BARNES: These Treasury statements are based on the adjustment of the account by inspectors, every one of them. We want to show that a man bearing the same authority as Mr. Hartman here was here inspecting and adjusting these accounts, and that he told this witness there was not one dollar due the Government, and these papers show that a long while after that another man came along and reported that there was money due the Government. We propose to show that this man was here in charge for the Interior Department and of the Land Office, and that Col. Christy said to him, "I have got twenty-five thousand dollars of Smith's money in my hands and want to pay whatever is due the Government," and he said there was not one dollar due, and on the faith of that Mr. Christy paid out the $25,000, and for that reason the Government did not get it.

By the COURT: I do not regard the inspector as an author-

230 ized agent.

By Mr. BARNES: We propose to show that he was sent out here by the head of the department, representing him; that he came here as the Secretary—as an arm of the Secretary. We propose to show that shortly afterwards another inspector came to Col. Christy

demanding that he pay a certain amount as due on this bond. If the Government has a right to send a man out here to collect from Col. Christy, that man has a right to bind the Government. We propose to show that McConnell came and demanded twenty-seven hundred dollars of Col. Christy on behalf of the Secretary of the Interior as the amount due the Government, and if the Government sends a man out here to collect money it seems to me we have a right to show their admissions.

By Mr. JEFFORDS: My same objection goes to that as to the other offer.

By Mr. BARNES: We propose to show that this inspector was authorized to receive payment; and a man who is authorized to receive payment is presumed to be authorized to state the amount that is claimed to be due.

231 By the COURT: I do not consider an inspector who comes out here to collect information and get at facts can bind the Government by any statement for which he was not specifically authorized. If competent at all, it seems to me it could only be by way of estoppel.

By Mr. BARNES: We avow that Smith was away thirty days just before he went out of office, and that Mr. Harlan was here taking charge of the office—in charge of all the books and papers of Smith for over two weeks and never did surrender them to Smith; that Smith came here and found Harlan in charge of the office, and that Col. Christy came here and found Harlan in charge of the office; that the Government had taken the office away from Smith and put it in the hands of Harlan, and Col. Christy finding him in charge of the office he went to Harlan and asked him how much was due the Government, and he said not a dollar; he said it was important for him to know, because he had $25,000 belonging to Smith to pay anything that was due, and he was told not a dollar was due.

232 By Mr. JEFFORDS: We object to it as immaterial, irrelevant, and incompetent because Mr. Harlan could not bind the Government.

By the COURT: The objection will be sustained.

By Mr. BARNES: With our avowal in the record we have nothing further to ask the witness on this subject. We except, of course, to the holding.

Q. Afterwards, Mr. Christy, did you see and have any interview with a man by the name of McConnell?

By Mr. JEFFORDS: I object.

By Mr. BARNES: It is mere preliminary.

By the COURT: As to these preliminary questions they can't prejudice anybody. Proceed.

A. I did.

Q. About how long afterwards—after Mr. Smith went out of office?

A. About six weeks.

Q. Where did you meet him?

A. In Phœnix.
Q. In what capacity was he acting?

By Mr. JEFFORDS:

Q. If you know.
A. He was acting as inspector.

By Mr. BARNES (resuming):

Q. Where did he meet you—in Phœnix, you say?
A. At the Commercial hotel, Phœnix.

Q. I don't want to put leading questions. Did he make
233 any demand on you to pay any money for Fred. W. Smith as Smith's bondsman?

By Mr. JEFFORDS: We object to that as immaterial.

By Mr. BARNES: We expect to show that Mr. McConnell is the same man upon whose statements these Treasury statements are based; that he came to the witness and demanded $2,700, and said that that was all that was due, and his reports are in those transcripts.

By Mr. JEFFORDS: I object on the ground that no declarations of that kind made by an inspector could bind the Government. They were made, if at all, by an unauthorized person, and the testimony would be irrelevant, immaterial, and incompetent; that it makes no difference what sum Mr. McConnell demanded of Col. Christy as being due from Mr. Smith at the time spoken of, and upon that point I suggest that the amounts put in here were admitted to have been received by Mr. Smith.

By the COURT: I will admit the evidence as to what he stated with reference to the amount due.

By Mr. JEFFORDS: We object to it and now except.

By the COURT: Simply as to contradictory statements; that
234 is all.

Q. What demand did he make of you?
A. He demanded the payment of $2,755.79.
Q. (Handing witness a paper.) Where did you get that paper?
A. I got it through the mail; at the post-office in Phœnix.
Q. As compared with the time you had an interview with Mr. McConnell?
A. I received this paper from McConnell at that time.
Q. He himself handed you this paper?
A. Yes, sir.
Q. And said that Fred. Smith owed that much?
A. Yes, sir.
Q. And demanded that you should pay it?
A. Yes, sir.
Q. Was it before or after he handed you this paper?
A. He wrote me this other after he got back to Tucson.
Q. And you received this one by the mail?
A. Yes, sir.

By Mr. BARNES: I offer this paper in connection with the evidence of this witness.

By Mr. JEFFORDS: I object to it on the ground that it is a memoranda which cannot bind the Government at all.

By Mr. BARNES: We put it on the ground that here is a man coming from the Government demanding money, and this is the demand; this is the paper he handed the witness as part of
235 the demand; it is a demand in writing that he made, and we offer it.

By the COURT: The paper does not on its face purport to be a statement of the account.

By Mr. BARNES: No; it a memoranda of it, that's all, in connection with the statement of the witness.

By the COURT: It will be admitted.

(Document marked "Ex. A. for defence.")

By the COURT: Of course, as to this testimony I shall charge the jury regarding its effect.

By Mr. JEFFORDS: We except.

By Mr. BARNES: Now, I offer the other letter in evidence, which came to him by the mail, as he has testified.

By Mr. JEFFORDS: That is objected to on the ground that the party who signed it had no authority to bind the Government at all, and that it does not on its face purport to be an entire claim against the Government or of the Government or anything of the kind; that it does not show that the accounts of Smith as receiver had been adjusted in any way by the proper officer of the Treasury Department, at Washington, or the Land Department, and
236 that it is not within any issue raised by the pleadings in this case.

By Mr. BARNES: It tends to contradict Mr. McConnell's testimony which is offered here in these Treasury statements; they are based, to some extent, on the truth of McConnell's statements, and we want to show they are not true.

By the COURT (after argument): I do not see that this purports on its face to be a statement of the amount due from Mr. Smith at all, and the objection will be sustained.

By Mr. BARNES: It is offered on the ground that this man demanded of him the money. We except.

(Document marked "I" for identification.)

Q. (Exhibiting another document.) Where did you get that letter?

A. In the mail in Phœnix.

Q. When?

A. Next day after it is dated—9th of January.

By Mr. BARNES: We offer it in evidence.

By Mr. JEFFORDS: We object for the same reason urged before.

Q. Right in connection with that I will ask you if Mr. Harlan showed you any commission from the Interior Department or the Department of the General Land Office.

By Mr. JEFFORDS: I object.

237 *By Mr. Jeffords: I object.*

By Mr. BARNES: I avow that I expect to show in this connection that Mr. Harlan showed him a direct authority from either the Commissioner of the General Land Office or the Secretary of the Interior to come out and settle this whole matter, which he showed to Mr. Christy at the time as his authority.

By Mr. JEFFORDS: I object to the avowal on the ground that there is no such authority or commission, and if there is it is the best evidence of that fact, and that nobody but the solicitor of the Treasury and the Secretory of the Treasury have the right to make compromises; and, further, that it is not sought to produce the commission here or any authority from any person having the right to bind the Government.

By the COURT: The objection to the paper is sustained.

Q. Did you have any interview with Mr. Bowman, the man who signed this letter?

A. I did.

Q. Did Bowman show you any authority to act on the matters of Frederick W. Smith and with the bondsmen?

A. He did not.

Q. Did Harlan show you any authority from any superior
238 officer, either the Secretary of the Interior or the Commissioner of the General Land Office?

A. He did.

Q. Signed by whom?

By Mr. JEFFORDS: I object.

By the COURT: That raises the same question of estoppel again.

By Mr. BARNES: I propose to show that this document went to the extent of authorizing this man to settle all amounts due on this bond.

By Mr. JEFFORDS: I object. Under the law they hadn't the authority to do it.

By Mr. BARNES: We expect to show that it came from a department having charge of this business.

By the COURT (after argument): I will admit the evidence now, and if I find out that it is incompetent I will strike it out and instruct the jury not to regard it.

By Mr. JEFFORDS: We except to the holding of the court on this point, with the privilege of asking to strike it out.

Q. Who signed the paper that Harlan had?

A. The Commissioner of the General Land Office.

Q. Can you state what that letter said—substantially its
239 words?

By Mr. JEFFORDS: I object to it on the grounds above set forth.

By the COURT: Yes.

Q. If you can, please do so.

A. It authorized him him to proceed to Tucson (interrupted)——

By Mr. JEFFORDS:

Q. It is a preliminary question. Can you state substantially the language of the letter?

A. I can.

By Mr. BARNES (resuming):

Q. Proceed.

A. It instructed him to go to Tucson, take charge of the Tucson land office (interrupted)——

By Mr. JEFFORDS: One moment. I object to any testimony as to that letter on the ground that it appears to have been in writing, and the writing is therefore the best evidence of what the letter was.

By the COURT: Oh, it is not a letter in their possession.

By Mr. AINSWORTH: You produce it, and we will put it in.

By Mr. JEFFORDS: It is not in my possession, and we haven't had it.

Q. Go ahead.

—. (Continuing:) Take possession of the land office at Tucson and settle with Fred. W. Smith as receiver.

240 Q. And where did you see him?

A. I saw him in the land office.

Q. Engaged in what?

By Mr. JEFFORDS: One moment. I object and move to strike out the answer. It was not a letter which comes within the avowal at all. It was a letter, he says, to take charge of the Tucson land office and settle with Smith. From the testimony of the witness it appears that it was a letter directing Harlan to settle with Smith.

By the WITNESS: As receiver; yes.

By Mr. JEFFORDS: To take charge of the Tucson land office. That was as far as the testimony goes. No instruction for him to collect money or anything of the kind from Fred. W. Smith or his sureties.

By the COURT (after argument at length): I will not strike it out now. Let it stand for the present.

By Mr. JEFFORDS: We except.

Q. How did you happen to come to Tucson to see him?

A. I came in the interest of the bondsmen.

Q. Did you have a conversation with him about Fred. Smith's affairs?

A. I did; a number of times.

241 Q. As receiver? Did you have a conversation with him about the settlement of Fred. Smith's accounts as receiver on that subject?

A. I did.

Q. Now, what did he say was the amount due the Government?

By Mr. JEFFORDS: That is objected to on the ground set forth in my former objections that in no event could any statement made by Mr. Harlan bind the Government in any way; that he was not

an adjusting officer, and the law provides who shall adjust these accounts, and it does not provide for giving authority to any other person to adjust the accounts. I object on the further ground that the testimony is immaterial, irrelevant, and incompetent for any purpose whatever.

By the COURT: It is not proper unless the Government can be estopped by it.

Q. The question now is what he said about the amount due on the settlement of the accounts with Smith.

By Mr. JEFFORDS: I move to strike out the answer to the question before that.

By the COURT: It all came in under objection, as I understood, but there is nothing as yet that would do any injury one
242 way or another. You may answer the question and I will consider its effect.

A. He said Mr. Smith's accounts were straight and he didn't owe the Government a dollar.

Q. I will ask you what you said to him with reference to your desire to settle with the Government as a bondsman.

A. I went to him and told him that I had come here in the interest of the bondsmen; that I had received $25,000 from Fred. W. Smith, and that I was prepared to settle any balance that I found due the Government, and he replied that there was no balance due.

Q. Did you, as a matter of fact, have the money then?

A. I did.

Q. Now, I will ask you have you paid that money out.

A. I paid it all out.

Q. On whose order?

By Mr. JEFFORDS: I object to that.

By Mr. BARNES: We propose to show that he paid it all out on the orders of Fred. Smith after that—this $25,000.

By Mr. JEFFORDS: I object to that on the ground that the accounts had not been adjusted and Mr. Harlan had no right to bind the Government by any such statement, and it is immaterial,
243 irrelevant, and incompetent.

By the COURT: The objection is overruled.

A. Order of Fred. W. Smith.

By Mr. JEFFORDS: It is all objected to and exception taken.

Q. Do you know whether Fred. W. Smith at that time was solvent or insolvent?

By Mr. JEFFORDS: That is objected to as immaterial.

By the COURT: I can't see how that is material.

Q. At the time this suit was commenced, do you know whether Fred. W. Smith was in Arizona or not?

A. He was not.

By Mr. JEFFORDS: I object.

By the COURT: I think you may answer that question. I will let that go in at this time.

Q. At and before the time this suit was commenced, was Fred. W. Smith solvent or not?

By Mr. JEFFORDS: Objected to as immaterial, irrelevant, and incompetent.

By the COURT: Answer the question.

By Mr. JEFFORDS: We except.

A. He was.

Q. Solvent or insolvent?

A. Insolvent.

By Mr. BARNES: Before proceeding further I will ask the
244 gentlemen if they expect to ask the court or jury to find an item of sixteen hundred dollars against Mr. Smith based on a draft, which we have alleged in our answer—$1,692.

By Mr. JEFFORDS: Yes, sir; we expect the court to ask the jury for judgment for every item proved.

By Mr. BARNES: The only question now is whether you will urge the jury to find on that particular item.

By the COURT: You had better put in the evidence.

Q. What do you know about a certain draft for $1,692? Tell what the draft was and all about it.

By Mr. JEFFORDS: It seems to me that question is objectionable, as to what he may know about a draft.

By the COURT: You may answer the question; it pertains to an item contained in that transcript.

By Mr. JEFFORDS: My objection is to the form of the question. If he knows anything of his own knowledge, that should be the foundation.

By the COURT: Yes; that is the proper way, of course, but I do not think it is particularly objectionable.

245 By Mr. JEFFORDS: But I object to the proof also as incompetent, immaterial, and irrelevant.

A. The Treasurer of the United States, J. H. Huston, issued draft No. 659 in favor of Fred. W. Smith, as receiver, either on October 5th or 7th, 1889. That draft was in the office when Fred. W. Smith came back from his leave and it was handed to him, I think, by Mr. Drummond. He put it in his pocket. I saw the draft at the time; the amount was $1,692, and when Inspector McConnell came to Phœnix and demanded (interrupted)——

Q. Was that after Smith had gone out of office?

A. When?

Q. The time McConnell came to Phœnix.

A. Yes, sir; Smith was then out of office. He came to Phœnix on the 11th or 12th day of January, 1890, and made a demand for the payment of this $2,755.79. He told me this draft had not been paid (interrupted)——

By Mr. JEFFORDS: I object to that as hearsay.

By Mr. BARNES: This was the man charged with the authority to come and demand the payment of this money from him, and we want to show that of this $2,755 which he demanded this draft was a part, and that in making this demand for twenty-seven hundred dollars he told him that the draft had not yet been paid by
246 the Government and the Government afterward paid the money to Smith.

By the COURT: What is the specific objection; that it was hearsay, the statement of McConnell?

By Mr. JEFFORDS: That is one objection, and the other is that the draft was negotiable by endorsement and it was issued in October, while Smith was in office, and whether it had been paid or not was immaterial, unless paid directly to Smith by the Government. That is their allegation. They say it was money due to Smith.

By the COURT: Well, upon that ground I will overrule the objection. They haven't sought yet to show to whom or how it was paid.

By Mr. JEFFORDS: Then I urge the other objection that it is hearsay.

By the COURT (after argument): Answer the question.

By Mr. JEFFORDS: We except on the ground stated in the objection.

A. He had a telegram from the assistant treasurer of the United States the day before (interrupted)——

By Mr. JEFFORDS: One moment. I object.

By the COURT: Confine it to what you know of your own knowledge.

247 By the WITNESS (continuing): And the draft wasn't paid. He said Smith had received it, but never paid it out, and some time it would be paid, and I asked him to telegraph the department and stop its payment, but he said, "No; the Government has a good bond and they will look to the bondsmen, and let the draft be paid." I reiterated my demand, and he refused to do it.

By Mr. JEFFORDS: I object to the answer.

Q. How was it drawn?

A. At sight.

Q. And what was it drawn on?

A. Assistant treasurer of the United States in New York.

Q. By whom?

A. The Treasurer of the United States at Washington.

Q. Payable to Fred. W. Smith?

A. McConnell said that it came under his own department and that he had ordered the draft issued, and therefore knew of the issuance of the draft, and that it was not paid.

By Mr. JEFFORDS: All of that goes under my objection.

Q. I think that is all we wish to ask the witness. Do you think of anything else, Col. Christy, that we haven't asked you about?

A. Not without the payment of some of these (interrupted)——

Q. No; I don't care about that. If we do we will call you
248 back again, but I think not.

Cross-examination.

By Mr. JEFFORDS:

Q. Col. Christy, you say you saw the letter which was written to Fred. W. Smith requiring his additional bond of thirty thousand dollars?

A. I did.

Q. Was not that letter, in substance, as follows: "By direction of the President the penalty of your bond has been increased to the sum of thirty thousand dollars. Please execute a bond in that sum and return to this department at your earliest convenience"?

A. I don't think it was.

Q. Are you sure it was not?

A. Yes, sir; I am.

Q. Are you sure that in that letter — a single word was said about the fact that Smith would be no longer permitted to exercise the functions of the office of receiver unless he gave the additional bond?

A. It might not have been worded in absolate language to that effect, but the inference was that if he didn't he would have to go.

Q. That was the inference which you drew?

A. No, sir; it was not the inference which I (interrupted)——

249 Q. You say you remember the letter substantially. Now, was there anything in the letter written by the Commissioner of the General Land Office to Smith stating that he would have to go, or that he would no longer be permitted to exercise the functions of the office of receiver or receive the emoluments of the office of receiver unless he gave that bond?

A. He was required to give a bond.

Q. He was required to give it, but was there anything said about his removal in case he did not give it?

A. Not in absolute language, I said, but by (interrupted)——

Q. There was not?

A. In terms, no; but the letter, in terms that could not be misunderstood, meant that interpretation.

Q. Meant that interpretation, and that was the interpretation you put upon it?

A. That was put (interrupted)——

Q. But there was nothing in language that said that he would be removed or not be permitted to exercise the functions of the office unless he gave the bond. That I understand to be your answer.

A. My answer was that there was nothing direct, as I recollect it—that there was no direct demand that he could not serve, but the interpretation was placed upon it, and I think that was the
250 only interpretation that could be placed on it.

Q. No threat of removal contained in it, then?

A. I think there was.

Q. Well, now do you know?

A. Only from my memory of the letter.

Q. Well, do you remember whether there was or was not?

A. I said there was a threat of removal.

Q. A threat of removal. You are sure of that, are you? Now, do you know Mr. Stockslager's signature?

A. I think I would know it if I saw it. I have seen it a number of times.

Q. Well, did you at that time know it?

A. No; I don't know that I ever saw it before.

Q. Don't know that you ever saw it before? You do not know of your own knowledge whether that letter was signed by Stockslager or not?

A. I could not testify that he signed it, because I didn't know his signature—I didn't know it then. I have seen it a number of times since, and it is the same signature.

Q. Did you ever see him sign it?

A. No, sir.

Q. Then, you do not know of your own knowledge Mr. Stockslager's signature?

251 A. I know of my own knowledge—I have been in business a long time, and if a man signs his name once I can tell it the second time, and as an expert I would say it was.

Q. Precisely, if you knew the signature at any time; but you do not know the signature of Mr. Stockslager, do you, of your own knowledge?

By Mr. BARNES: I insist that the question is an unfair one.

By the COURT: Oh, no; I think not. The witness can state the fact, whatever it be.

Q. Did you ever have an acknowledgment from Mr. Stockslager that he ever signed any paper that you have ever seen with his signature appended to it?

A. I never had any official communication with the gentleman.

Q. Did you ever have any personal or private communication by which you could learn whether or not the letter you speak of was signed by Mr. Stockslager or not?

A. I have seen his official signature signed to other papers.

Q. But you do not know whether he signed them or not, do you, of your own knowledge?

—. ——.

By Mr. BARNES:

Q. You didn't see him write them?

A. I didn't see him write them.

252 By Mr. JEFFORDS (resuming):

Q. Did you ever hear him acknowledge them to be his?

A. I never met him.

Q. Then of your own knowledge you are not familiar with Mr. Stockslager's signature, are you?

By Mr. BARNES: I object to that as an assumption and as argumentative.

By the COURT: Overruled.

A. I never saw him sign it, but I have seen his signature signed to official documents several times.

By Mr. BARNES: That answers it.

By Mr. JEFFORDS: I submit it does not, and I ask that the witness be required to answer it.

By the COURT: Put your question again if you want a ruling.

Q. Of your own knowledge, Colonel, you are not familiar with Mr. Stockslager's signature, are you?

By Mr. BARNES: Now, my objection is that it is fully answered above.

(The reporter read the record as above.)

By the COURT: You may state whether that is the only knowledge you have on the subject.

By the WITNESS: That is the only knowledge I have on
253 the subject.

By the COURT: That answers it.

Q. The letter was not brought to you by Mr. Smith, I believe you said?

A. No, sir; brought by Gen. Wilson.

Q. Did you read the letter yourself?

A. I did.

Q. You say that at the time Mr. Harlan came to you and demanded the settlement and you had a conversation with him that you had twenty-five thousand dollars of Smith's money in your hands?

A. Mr. Harlan didn't come to me; I went to him.

Q. Well, when Harlan came to you or you went to him, you say that you had twenty-five thousand dollars of Fred. Smith's money in your hands?

A. Yes, sir.

Q. Was that Fred. Smith's own money, Colonel?

A. I do not know whose money it was. He gave it to me.

Q. Don't you know that it was money that Fred. Smith had received as receiver of the land office here at Tucson?

By Mr. AINSWORTH: That we object to as hearsay.

By the COURT: Answer the question.

A. No, sir; I do not.

Q. Where did Fred. Smith give you that money?

A. He gave it to me in Tucson.

Q. At what date?

A. On the fourth day of December, 1889?

254 Q. December 4th, 1889?

A. Third or fourth; I ain't sure which.

Q. Had he been removed from office at that time?

A. Yes, sir.

Q. And Charles R. Drake had been appointed his successor?
A. Yes, sir.
Q. He gave it to you upon his return home from the leave you have spoken of?
A. After he had turned his office over.
Q. When Mr. Smith was coming home on that leave did you meet him at El Paso?
A. I did.
Q. Did you go to the El Paso banks to find out what moneys were deposited there by Smith?
A. Did I?
Q. Yes, sir.
A. No, sir.
Q. Did any one for you or in your interest?
A. Not at that time.
Q. Did you have any conversation with Fred. W. Smith as to what money he had on hand at the time he was in El Paso and when you met him there?

By Mr. BARNES: We object as not cross-examination.
By the COURT: Yes; he stated it was Smith's money.
By Mr. BARNES: He said Smith gave it to him, and we
255 say that whatever Smith may have said cannot be a declaration to bind these bondsmen.
By the COURT: They have a right to go into the question as to whose money it was and the circumstances under which he had it; what Smith told him may be the only knowledge as to whose money it was.

Q. At the time you went to El Paso to meet Smith you say that you did not go to the banks, or any one for you, or find what moneys were deposited by Smith?
A. That is what I said.
Q. Did you before the time you met Smith there?
A. Mr. Bowman went down.

By Mr. AINSWORTH: We object to anything Bowman may have said about it.

Q. At your request?
A. He went at the request of Mr. Harlan.

By Mr. AINSWORTH: We ask to have that stricken out.

Q. Did he go at your request?
A. No, sir.
Q. Did you go with him?
A. No, sir.
Q. Did you ever have any conversation with Smith while in office as to where he was keeping the moneys he received as receiver?
A. No, sir.
Q. You say that at the time of the commencement of this suit Smith was insolvent?

A. Yes, sir.

256 Q. At the time he was off on leave wasn't he also insolvent?

A. I don't know.

Q. Don't you know what Fred. W. Smith's circumstances were at the time you went on his bond?

A. No, sir.

Q. Don't you know approximately what they were?

A. I do not.

Q. Don't you know that he had failed up at Tombstone a short time before that; failed in business there?

By Mr. BARNES: That is objected to as being asked without intent to get an answer, and it is not cross-examination.

By the COURT: He may answer as to whether he knows.

A. I don't know a thing about it. I knew nothing about Smith's circumstances at all when I went on the bond.

Q. At the time Fred. Smith gave you this $25,000 you speak of did he give it to you in money or in drafts?

A. Drafts and checks.

Q. Drafts and checks. Upon what bank were they?

A. The drafts were all drawn on New York.

Q. Were they bills of exchange or his own drafts?

A. Bills of exchange.

Q. That is, they were bank drafts?

A. Yes, sir; bank drafts.

Q. By what banks were they drawn?

257 A. I don't know as to all of them; some of them were drawn by the State National Bank of El Paso.

Q. To what amount were they drawn by that bank?

A. I couldn't tell you to a dollar, but less than fifteen thousand dollars.

Q. Well, was there more than fourteen thousand?

A. Between fourteen and fifteen thousand dollars.

Q. That were drawn by the State National Bank of El Paso?

A. Yes, sir.

Q. Payable to what order?

A. Order of Fred. W. Smith.

Q. Nothing else?

A. That's all.

Q. Now, what were the other drafts? What banks were they drawn by?

A. I don't recollect whether the Santa Cruz Valley bank was the name of the concern at that time, but it is the bank here in Tucson that Freeman was cashier of.

Q. They had drawn drafts for how much and on what banks?

A. Drawn on San Francisco and New York, in the neighborhood of nine thousand, payable to Fred. W. Smith.

Q. Had you been to the Santa Cruz Valley bank to find out whether he had any money there or not?

A. I went to see Freeman one day; yes, sir.
Q. Did he have any money deposited there?

258 By Mr. AINSWORTH: We object to what Freeman may have said about it.
By the COURT: Objection sustained.

Q. Now, the checks—upon what bank were they drawn, Colonel?
A. I think they were all drafts—all drawn by banks in New York and San Francisco. I don't recollect; I haven't a memorandum of them now.
Q. How soon after Mr. Smith gave you the drafts and checks you speak of was it before you commenced paying money out on his orders?
A. Within a couple of days.
Q. Had you seen Mr. Harlan then?
A. I had.
Q. And within the couple of days after Smith gave you the drafts and checks you commenced paying his orders?
A. Yes, sir.
Q. Did you demand that Smith should give you the money that he turned over to you?
A. No, sir; I did not.
Q. Did you ask him for it?
A. I did, at El Paso, but not when he turned it over or after I was at El Paso.
Q. How is that?
A. When I was at El Paso I asked him to turn over what funds he had in the El Paso bank to me.
Q. How did you know that he had funds in the El Paso bank?
A. I told you that Mr. Bowman went down there. He refused to do it—that is, he did not do it—and he drew the money him-
259 self and put it in his pocket, in the way of drafts.
Q. Do you know whether that money was deposited to him as receiver, to his account as receiver, or to Fred. W. Smith simply?
A. Nothing only what the bankers told Mr. Bowman; showed him the account.
Q. I am asking now of your own knowledge.
A. No, sir; I do not.
Q. What day was it that you made this demand of Mr. Smith at El Paso for the money?
A. I don't know the day of the month, but it was on Thanksgiving day of 1889.
Q. You say that Smith refused to turn the money over to you and drew it himself?
A. Yes, sir.
Q. That is the money that he had in the State National Bank of El Paso, was it?
A. Yes, sir.
Q. When did he draw it?

By Mr. BARNES: If you know.

Q. Yes; if you know.
A. I don't know. I think the drafts were dated, though (interrupted)——
Q. What is that?
A. I ain't sure, but I think that he drew it on Thanksgiving day.
Q. Did you come back to Tucson with him?
A. I did.
Q. How long after Smith came back to Tucson was it that he turned over this money to you, this $25,000?
260 A. I could tell better if I knew the date of Thanksgiving.
Q. Well, how many days after? You can figure that up.

By Mr. AINSWORTH: Approximately, I suppose, you mean?
By Mr. JEFFORDS: Yes.

A. I told you awhile ago it was on the third or fourth of December following.
Q. Did you stay here with Mr. Smith till he turned the money over to you?
A. I wasn't sleeping with him.
Q. After you came back from El Paso, I mean. I know; but did you stay in Tucson?
A. I stayed in Tucson; yes, sir.
Q. You say you did not ask him for the money except in El Paso?
A. No, sir; I didn't.
Q. Did anybody ask him for the money for you?
A. I think not.
Q. After you came to Tucson he came to you and turned it over to you of his own volition, did he?
A. Yes, sir.
Q. For what purpose, Colonel?
A. First, to protect his bond.
Q. And what other purpose?
A. For the purpose of settling his accounts on the outside.
Q. At the time he turned the money over to you—well, you say his accounts on the outside. What accounts on the out-
261 side?
A. Accounts that he owed.
Q. To whom?
A. Different parties.
Q. For moneys they paid him as receiver?

By Mr. BARNES: That is a legal question rather than a question of fact, but if he knows——
By Mr. JEFFORDS: He knows what the agreement was.
By the COURT: Yes; he may state that. I think the better way is for him to state what Smith said about it.

Q. State fully what Smith said about it.
A. He said he owed parties for money that had been paid in to him on proof.

Q. On proofs?
A. Yes, sir.
Q. As receiver?
A. No, sir; he didn't say as receiver.
Q. Money that had been paid in to him on proofs. Did he give you the names of those parties?
A. He did not; he simply drew his order on me and I paid his orders.
Q. He said that he owed money to parties that had been paid him on proofs. What else did he say?
A. I don't know that he said anything else. He talked a good deal, but nothing that was material to this question.
Q. Well, as to what was to be done in the *pay* of payment. We would like to have it all.
262 A. I was to pay his orders, and that was all I was to do, after first protecting the bondsmen. I went to Harlan before I paid out a dollar, and asked him (interrupted)——
Q. One moment.
By Mr. AINSWORTH: He can state what he did right along.

By the COURT:

Q. You went to Harlan?
A. I did, after he paid me the money.

By Mr. JEFFORDS: I want to know what the agreement was, and then any explanation which the court thinks he has a right to make I will yield, of course, to the court.
By the COURT: Oh, yes; that wasn't responsive to the question.
By the WITNESS: My agreement was, as I say, first to protect the bond and then to pay the balance on his orders.

By Mr. JEFFORDS (resuming):

Q. To the parties to whom he owed on proofs?
A. To the parties that he drew his check in favor of; just as a banker would use checks. I was made his banker to pay his debts.
Q. Did you *any* any of these moneys to any of the parties
263 who were named in the list about which Mr. Drake and Mr. Brown were examined the other day?

By Mr. BARNES: That is immaterial. The orders themselves are the best evidence. The fact that it was paid to some of these persons is immaterial and not cross-examination.
By the COURT: It is the usual hour of intermission, and we will take a recess. The jury will bear in mind the admonition of the court.

(Recess 12 m. to 1.30 p. m.)

Q. Were those orders in writing?
A. Yes, sir.
Q. Have you them?
A. I think I have most of them.

Q. With you?
A. Yes, sir.
Q. Do you know John Farson?
A. Yes, sir.
Q. Was one of those orders on his account?

By Mr. BARNES: That is immaterial.
By the COURT: If the money went to pay for accounts, which would not have been valid accounts against Smith, they certainly could not have been damaged by the action of the Government. If it wasn't Smith's money it wasn't money in the hands of the sureties which would have been applied to the payment of the
264 debts. (After argument:) Answer the question.

By Mr. AINSWORTH: We except.

Q. Do you know John Farson?
A. I do.
Q. Where does he reside?
A. Chicago.
Q. Did you pay him any of the $25,000 which Fred. Smith turned over to you?
A. Yes, sir; I did.
Q. On Smith's order?
A. Yes, sir.
Q. How much?
A. 320.
Q. Do you know F. J. Blaisedell?
A. No.
Q. John Shoshusen?
A. No, sir.
Q. Thomas Murphy?
A. Yes, sir.
Q. Did you pay him any of the money which Smith turned over to you?
A. I did.
Q. How much?
A. $640.
Q. Do you know David Turner?
A. Yes, sir.

By Mr. BARNES: The same point goes to all of this.
By the COURT: Oh, yes; the same ruling.

Q. I did not catch your answer.
A. Yes, sir.
Q. Did you pay him any of the money which Fred. Smith turned over to you?
A. I paid him $160 on Fred. Smith's order.
Q. Do you know D. Palmer?
A. No, sir; I do not.
265 Q. Henry Percy Schultz?
A. No, sir.

By Mr. AINSWORTH: We ask that they be restricted as to being the same men you have named there. Identity of names is not identity of persons.

By Mr. JEFFORDS: The presumption is that identity of names is identity of persons.

Q. Do you know A. Kleinstauber?
A. No, sir.
Q. C. Paddekin—do you know him?
A. No.
Q. Leo Frankenberg?
A. No.
Q. Sarah F. Clay?
A. No, sir.
Q. W. B. Taylor?
A. No, sir.
Q. Renslow Crosby?
A. No, sir.
Q. W. E. Pomroy?
A. I don't think I knew him. I didn't pay him any money.
Q. Yesais?
A. No, sir.
Q. W. H. Labarae?
A. That ain't his name; W. H. Labaree.
Q. Yes; Labaree, I believe it is?
A. I don't know him, but I paid him.
Q. On Smith's order?
A. Yes, sir.
Q. How much?
A. I don't recall. I think $183; between that and $200, somewhere.
Q. $183.50 it is here; good recollection. Do you know Henry Armer?
A. No, sir.
266 Q. William Dameron?
A. No.
Q. F. T. Powers?
A. No.
Q. J. A. Lavoie?
A. No.
Q. De Barth Shorb?
A. I know him.
Q. Did you pay him any of the money?
A. No, sir.
Q. J. R. Hazard?
A. No, sir.
Q. S. P. Vickers?
A. Yes, sir; paid him forty dollars on this account.
Q. J. V. Vickers?
A. Yes, sir; forty dollars.
Q. Jesus Aros?

A. No, sir.
Q. John L. Storey?
A. No.
Q. A. Corra?
A. No.
Q. W. C. Lemon?
A. No, sir.
Q. L. J. Hedgepeth?
A. No.
Q. James Keeting?
A. No.
Q. N. O. Fulwiler?
A. Yes, sir.
Q. Did you pay him anything on Smith's account?
A. I paid her, not him.
Q. How much did you pay her?
A. I think $640; I ain't sure, but near that.
Q. S. Gonzales
A. No, sir.
Q. S. Rochie?
A. No.
Q. Mary Thomas?
A. No.
267 Q. Henry Burress?
A. No.
Q. A. H. Hoadley?
A. No.
Q. W. D. Sharp?
A. No.
Q. Did you pay him anything on this account?
A. I think I paid him eighty dollars.
Q. J. Antonio Rodriguez?
A. No, sir.
Q. J. M. Lopez?
A. No, sir.
Q. W. A. Hancock?
A. Yes, sir.
Q. Did you pay him anything on Smith's account?
A. On Smith's order.
Q. How much?
A. $200.
Q. Arthur Marlow?
A. No.
Q. J. B. George?
A. No.
Q. T. E. Jones?
A. No.
Q. D. D. Revis?
A. No.
Q. H. Freichler?
A. No.

Q. J. S. Waddill?
A. Wadwill, I understand it.
Q. Well.
A. Yes, sir.
Q. How much did you pay him on Smith's order?
A. $17.
Q. J. J. Acuna?
A. No, sir.
Q. W. C. Despain?
A. No, sir.
Q. C. A. Luke?
A. Yes, sir.
Q. Did you pay him anything on Smith's order?
A. I did.
268 Q. How much?
A. $200.
Q. W. H. Skinner?
A. Junior?
Q. It isn't so here.
A. I paid W. H. Skinner, Jr.
Q. How much did you pay W. H. Skinner?

By Mr. AINSWORTH: We object, unless the name is on the list. They are two different persons.

Q. I ask if you paid W. H. Skinner?

By Mr. AINSWORTH: And he says he did not pay W. H. Skinner.

Q. Do you know a man by the name of W. H. Skinner?
A. I do not.
Q. Do you know a man by the name of W. H. Skinner, Jr.?
A. I do.
Q. Is there any other man by the name of W. H. Skinner, to whom you paid any money on Fred. Smith's account, except the one you call W. H. Skinner, Jr.?
A. No, sir.
Q. Did you pay W. H. Skinner, the one you know?
A. I didn't pay W. H. Skinner; I paid W. H. Skinner, Jr.
Q. The man you know by the name of W. H. Skinner, with the addition of "junior," you paid what?

By Mr. AINSWORTH: We object to the form of the question.
By the COURT: Answer the question.
By Mr. BARNES: We except.

Q. Whether the man you know as Skinner, with the addi-
269 tion of "junior," whether or not you paid him any money on Smith's order?
A. I paid W. H. Skinner, Jr., $200 or $210; I am not sure which.
Q. J. L. T. Waters: do you know him?
A. No.
Q. Ever pay him anything on Smith's order?
A. No.

Q. J. H. Brown?
A. Yes, sir; I paid him.
Q. How much?
A. Forty dollars.
Q. On Smith's order?
A. Yes, sir.
Q. Thomas Davis?
A. Yes, sir.
Q. Did you pay him anything on Smith's order?
A. I paid the Thomas Davis account.

By Mr. AINSWORTH: I would like to ask Mr. Jeffords if Brown's is not passed by authority of letter M?

By Mr. JEFFORDS: Paid him forty dollars, and the amount here is $120.

By Mr. BARNES: We object to counsel stating what is there.

Q. Now, Thomas Davis?
A. Yes, sir.
Q. Did you pay him anything on Smith's order?
A. I did.
Q. How much?
A. $1,280.
Q. W. F. Hanna?
A. Yes, sir.
Q. Did you pay him anything on Smith's order?
A. I did.
Q. How much?
A. $240.
270 C. M. Copes; did you pay him anything on Smith's order?
A. I paid her, not him.
Q. How much?
A. Eighty dollars.
Q. F. J. Dysart?
A. No, sir.
Q. B. Mosier?
A. No, sir.
Q. Emma Sampson?
A. No, sir.
Q. H. J. Dowdle?
A. No.
Q. John Asebell?
A. No.
Q. G. M. Tiffany?
A. No.
Q. F. J. Horton?
A. No, sir.
Q. C. H. Slankard?
A. No.
Q. H. Bendal?
A. No.

Q. A. W. Horan?
A. No.
Q. J. H. Hagerty?
A. No.
Q. D. W. Kean?
A. Yes, sir.
Q. How much?
A. $636.
Q. J. W. Hendrix?
A. No, sir.
Q. A. G. Utley?
A. No, sir—yes, sir.
Q. How much did you pay him?
A. $640.
Q. On Smith's order?
A. Yes, sir.
Q. H. P. Hine?
A. I know her.
Q. Did you pay her anything?
A. Yes, sir.
Q. On Smith's order?
A. Yes, sir.
271 Q. How much?
A. $320,
Q. E. A. Torrea?
A. No.
Q. O. L. Pease?
A. Yes, sir.
Q. Did you pay him anything out of this money you received?
A. $160.
Q. On Smith's order?
A. Yes, sir.
Q. J. W. Knight or I. W. Knight?
A. No.
Q. H. T. Willis?
A. No, sir.
Q. J. D. Andrevos?
A. No.
Q. Joseph Laton?
A. I paid the son of the Mormon bishop—I think it was Joseph—but they spell it L-a-y-t-o-n.
Q. How much did you pay him?
A. $200.
Q. On what account?
A. On the order of Smith.
Q. Charles R. Rogers?
A. No, sir.
Q. Well, R. J. de Schwenker?
A. No.
Q. John J. Horton?
A. No.

Q. J. S. Masier?
A. No.
Q. J. T. Hidesth?
A. No.
Q. H. M. Martinez?
A. No.
Q. Chas. Odell?
A. No.
Q. J. H. Bogan?
A. No.
Q. John W. Dorrington?
A. No.
Q. Lawrence Russell?
A. No.
272 Q. Robert B. Casey?
A. No.
Q. Jacob R. Haigler?
A. No.
Q. Oscar F. Townsend?
A. Yes, sir.
Q. How much did you pay him?
A. $315.
Q. On an order of Smith's?
A. Yes, sir.
Q. Frank G. Blaisdell?
A. No. That is on twice, is it? You called it on the other list.
Q. Here is one that has not been called yet—Fred W. Smith.
A. I don't know him.
Q. Hiram S. Stevens?
A. No.
Q. John L. Storey?
A. No.
Q. James Quinlan?
A. No.
Q. Jesus Violobas?
A. No.
Q. Freeman T. Powers?
A. No.
Q. Francis H. Hill?
A. No.
Q. Isabel de Haas?
A. No.
Q. Jess J. Jahl?
A. No.
Q. A. H. Noon?
A. No.
Q. Alme Kerby?
A. No.
Q. Those are the only persons, then, to whom you paid money on Smith's orders?
A. Yes.

Q. Did you pay any other money to any other persons,
273 Colonel, on the orders of Smith upon proofs which they had made before him?

By Mr. BARNES:

Q. Well, do you know about the proofs?
A. I don't know anything about the proofs, but I paid other money on orders.

By Mr. JEFFORDS (resuming):

Q. Did his orders state what they were for?
A. No, sir.
Q. Did you retain any of the money yourself?
A. No, sir.
Q. Did you pay any of the moneys over to Judge Wallace for any of his clients?
A. No; I paid the money—what I paid—direct to the party that the order was drawn in favor of.
Q. Yes. Do you know whether they were entrymen or not of public lands?
A. I do not know of my own knowledge anything about that.
Q. Or from anything you heard from Mr. Smith?
A. No, sir.
Q. Do you know of no other person to whom you paid moneys that had paid them to Smith in his capacity as receiver, excepting those you have named?
A. Not of my own knowledge I do not; no, sir.
Q. Well, from anything you heard from Smith?
A. I didn't have any conversation with Smith about that
274 at all, further than he gave me the money and ordered me to pay it out on his order, which I did.
Q. Did you pay money out without any showing to you as to what account it was due on?
A. Yes, sir.
Q. Did not you refuse a large number of orders?
A. No, sir; not as long as he had any orders. When the money run out I refused orders; yes, sir.
Q. How much money had you paid out up to the time you met McConnell?
A. I think about twenty-four thousand dollars.

By Mr. JEFFORDS: That will do, Colonel.

CHARLES R. DRAKE recalled on behalf of defense.

Direct examination.

By Mr. BARNES:

Q. What date did you assume the office of receiver?
A. December 3, 1889.
Q. Whom did you succeed?
A. Frederick W. Smith.

By Mr. AINSWORTH:

Q. When was your appointment made? What is the date of your commission?

A. Some time in November. I forget the date.

275 By Mr. BARNES:

Q. Some days before you assumed the duties of the office?

A. Yes, sir.

By Mr. AINSWORTH:

Q. When you say you assumed the office you mean at the time you got it from Mr. Smith?

A. Yes, sir.

Q. You were appointed some time prior to that?

A. Yes, sir.

Q. How long?

A. Over a month.

Q. And qualified to act?

A. Yes, sir.

Q. Over a month prior to that time?

A. I wasn't qualified to act over a month prior to that time, but after the appointment I had then to file my bond. They notifie me that I had been appointed, and then I prepared and forwarded my bond.

Q. Before your commission issued?

A. Yes, sir.

Q. And your commission issued when?

A. It was issued at the time I was appointed, but it wasn't forwarded to me until I had filed my bond.

Q. About what time was that?

A. Well, the first time I sent a bond there there was some informality about it—some irregularity about it—and I had to forward another, and that took a space of nearly three or four weeks.

Q. Do you know about what time the commission came to you?

276 A. My commission came to me, I think, about November 27th or 28th.

By Mr. BARNES (resuming):

Q. And you were then qualified to act?

A. Yes, sir.

Q. (Exhibiting book.) What book is this?

A. That is the Register of Disbursing Accounts made by the receiver.

Q. That is for the last quarter of whose term of office there (indicating)?

A. That is Mr. Smith's.

Q. His last quarter?

A. No, sir; not his last quarter. It is the last quarter he made out, but not his last quarter.

Q. The quarter ending what time?
A. Sept. 30, 1889.

By Mr. BARNES: We offer this in evidence.

By Mr. JEFFORDS:

Q. What book is it?
A. Book of Disbursements of Receiver, as disbursing agent.
By Mr. JEFFORDS: What is the purpose of the offer?
By Mr. BARNES: To dispute your statements here. They are charging us with a balance of this account without including $300 that the account shows he ought to have been credited with.

277 By Mr. JEFFORDS: It don't appear that it was a proper payment; this is a book kept by Smith himself and is evidence of nothing.

By Mr. BARNES: It also shows that he disbursed $25 for rent which we have not received credit for.
By the COURT: This purports to have been made by authority of some letter. The question is whether this is competent evidence.
By Mr. BARNES: That standing alone I do not think would be competent. That shows that he accounted for it as disbursed money, and now we propose to follow it up with Mr. Borton's testimony that he received the money. The entry is in Smith's handwriting while he was in office, and made in the course of business, showing the disbursement.
By the COURT (after further argument): I will overrule the objection. It may be admitted.

By Mr. AINSWORTH:

Q. Now, about the affidavit in the case of Frank Proctor, final proof under letter M, did you take his affidavit as to whether he paid Smith any money or not?
A. I think it must have been in the proofs.
Q. Do you remember anything about that at all?
A. I do not remember of my own knowledge; no, sir.

By Mr. JEFFORDS: What is the purpose of this?

278 By Mr. AINSWORTH: We propose to show that Frank Proctor never paid the money to Smith at all.

By the COURT: You may show that.

Q. I will ask you, Mr. Drake, if you have found that order in your office from the general solicitor of the Land Department in relation to the responsibility of the bond as disbursing officer?
A. I presume that did not emanate from the solicitor of the land office; it is, I think, from the solicitor of the Treasury Department.
Q. That's it.
A. I have failed to find any letter of that kind. The only thing I have is official notification to me forwarding a bond which I had to prepare, in the sum of five thousand dollars, as special disbursing agent.

By Mr. JEFFORDS: It is objected to as immaterial.

By the COURT: It does not do any harm. It was a voluntary statement of the witness.

By Mr. BARNES:

Q. Can you produce the paper you speak of?
A. I can produce it.

By Mr. AINSWORTH:

Q. Has that the copy of the order in?
A. I have got the original letter.
279 Q. Yes; if you will, produce that, please.
A. I will have to go and get it from my safe.
Q. Please send it, and see, too, if you can find the Proctor affidavit.
A. (The witness retired from the stand and from the court-room.)

THOMAS A. BORTON, a witness called and sworn on behalf of the defense, testified as follows:

Direct examination.

By Mr. BARNES:

Q. Mr. Borton, between the months of June, 1889, and August, 1889, in what were you engaged?
A. I was clerking in the United States land office at Tucson.
Q. What did you do to qualify as such clerk?
A. I subscribed the oath, and it was sent on to the department.
Q. Was there any authority from the department to the receiver here to employ you?
A. There was authority to the register and receiver; yes, sir.
Q. What was that authority?
A. That was Commissioner's letter A, of June 22, 1889.
280 Q. Have you a copy of it?
A. I have a copy of it in my office; the original I suppose to be in the land office; it was there when I left.
Q. Will you produce the copy?
A. Yes, sir; it is in my office.
Q. How much were you paid, and by whom, for that service?
A. The letter stated that the clerk so employed was to be employed at a salary not to exceed one hundred dollars a month, paid quarterly.
Q. How much were you paid under that employment?
A. Altogether?
Q. Yes, sir.
A. I was paid at the rate of one hundred dollars per month from the first day of July, 1889, to the 8th of January, 1890.
Q. Now, here is an item of $300 paid you. Who was it paid by?
A. The first quarter's salary was paid by Fred. Smith, receiver; I receipted to him, I think, in duplicate for it.
Q. Do you know anything about the payment of twenty-five dollars for office rent authorized by letter A, August 21, 1889?
A. Yes, sir; such a letter came to the office.

Q. Do you know anything about the payment of twenty-five dollars under that letter?

281 A. No; I don't know anything about the payment; the authority came authorizing such payment to be made.

By Mr. BARNES: Will you admit that Ben. Parker will testify he got that money, Mr. Jeffords?

Q. That is all, except the letter, as to this point. Do you know about the Proctor proof; were you in the office at the time that proof was filed?

A. I was in the office at the time the proof was taken, and possibly I may have taken the proof myself.

Q. Do you know whether Frank Proctor paid any money on that proof?

A. At the time the proof was taken he did not.

Q. Do you know whether he did at any other time after that and while you were in the office?

A. I don't remember that he did; all I know was a conversation (interrupted)——

Q. Who between?

A. Between Smith, the receiver, and himself, regarding the money. He didn't pay any money (interrupted)——

By Mr. JEFFORDS: I object. He says he don't know about its being paid.

By Mr. BARNES: He says he knows about a conversation,

282 and we avow that we will show the money was not paid.

By the COURT: If he knows it was not paid, that would be competent, of course; otherwise it would be negative proof.

By Mr. BARNES: This conversation will show that it was not paid. I avow that we will show that Proctor said at that time that he declined to pay it and would not pay it, and said that he would get scrip afterwards and file it; that he could get scrip cheaper than cash, and that he would get scrip and hand it in, and I propose to follow it up by showing that he never did that.

By the COURT: The witness says he did not pay it then, and that would not show that it was not paid afterwards. It is hearsay. Mr. Proctor's testimony would be competent, but this is not.

Q. Do you know anything about any entry made in the book by Smith as to whether the money was paid or not?

A. Yes, sir.

Q. What entry was made?

A. "No money."

Q. In whose handwriting?

A. Mr. Smith's clerk, Drummond.

Q. Was Smith present?

A. I think so; I am not sure.

Q. That entry was made with Smith's knowledge and di-

283 rection?

A. Certainly, with his knowledge; yes, sir.

Q. The memorandum put there, "No money"?

A. "No money."

Cross-examination.

By Mr. JEFFORDS:

Q. You don't know whether afterwards Mr. Proctor paid the money to Mr. Smith?

A. After what time?

Q. After the time the entry was made in the book you speak of. How long was that after the proof was taken?

A. The entry was probably made on the books the date of the proof being taken.

Q. Yes. Now, as to whether or not Proctor paid the money to Smith after that?

A. I don't know—that is, if he paid it two or three months after that I don't know—no.

Q. Can you say whether he did or not pay the money to Smith afterwards—whether Proctor did or not?

A. What do you mean by "afterwards"?

Q. After the date the proof was taken and when this entry was made, and after you heard this conversation or not.

A. I can't swear that he didn't.

Q. You cannot?

A. No.

By Mr. BARNES:

Q. Did you remain as clerk till Smith went out of office?

284 A. I did, and after, under Mr. Drake.

Q. During that time did Mr. Proctor pay that money?

By Mr. JEFFORDS: Do you know?

Q. Yes; do you know of his paying?

A. I do not.

Q. Could he have paid it in the course of business without your knowing it?

A. Yes, sir; it could have been done.

Q. It is possible?

A. Yes, sir.

Q. Is it very probable?

By Mr. JEFFORDS: To that I object.

By Mr. BARNES: The fact is he never paid it, and we cannot get him; he is out of the country.

By Mr. JEFFORDS:

Q. Under this letter A, how long was Mr. Smith authorized to employ you as clerk?

A. I don't know how long. I remained as official clerk from the first of July to the 8th of January, 1890.

By Mr. JEFFORDS: We object to it. The letter does not contain the authority covering any such period.

By the COURT: The question is whether he was authorized to act as clerk during the time covered by that entry?

By the WITNESS: Mr. Drake's accounts will show it, too.

285 Q. I want to know whether or not during the month of July Fred. W. Smith had any authority to employ him as clerk in the land office?

A. Want me to answer?

Q. Yes, sir.

A. He did.

Q. Under what authority?

A. Letter A, June 22, 1889. Mr. Brown himself signed the letter.

Q. That is the letter you are going to bring up?

A. Yes, sir; that is one of the letters.

Q. Well, that is all now.

CHARLES R. DRAKE, recalled by the defense for further direct examination.

By Mr. BARNES:

Q. Did you get the letter you spoke of?

A. Here is the letter as disbursing agent and here is the bond (producing documents).

By Mr. BARNES (after examining same): I don't think we care about these. We are perfectly willing to have them go in, but they will object.

By the WITNESS: I am ready to testify about Proctor's
286 case.

Q. Was there an affidavit there?

A. There was one filed, but it is not there now.

Q. What did it say?

A. The affidavit set forth that he had paid it to Smith, and that evidence was substantiated by affidavit of Drummond, who was then acting for Mr. Smith.

By Mr. BARNES: All right. Here is a copy of the letter as to Mr. Borton's salary and the twenty-five dollars rent. We offer these letters.

By Mr. JEFFORDS: There is no necessity. We admit that he was authorized to employ Mr. Borton, upon examination of the authority.

By Mr. BARNES: We will consider them in anyway.

(2 papers, pinned together, marked "Ex. C for Def'ts.")

LINCOLN FOWLER, a witness called and sworn on behalf of the defendants, testified as follows:

Direct examination.

By Mr. BARNES:

Q. Are you one of the defendants?

A. Yes, sir.

Q. (Exhibiting paper.) What is that?

287 A. Copy of a letter which I wrote to the Secretary of the Interior.

Q. What kind of a copy is it?

A. It is a letter-press copy taken from the original letter.
Q. That letter you mailed?
A. Yes, sir.
Q. The letter of which this is a fac-simile you mailed to the Commissioner of the General Land Office?
A. To the Secretary of the Interior; yes, sir.

By Mr. BARNES: We offer it.
By Mr. JEFFORDS: We object on the ground that it is immaterial and irrelevant and incompetent, and on the ground that it constitutes no defense to this action and is outside of any issue made in this case.
By the COURT: The objection is sustained. There is no pleading under which it seems to me it could be admitted.
By Mr. BARNES: That is all. We save the exception.

THOMAS A. BORTON, recalled on behalf of the defense for further direct examination.

By Mr. BARNES:

Q. You have stated that Mr. Smith paid you $300, as appears by that book?
A. The first quarter; yes, sir.
288 Q. Did he pay you any money after that?

By Mr. JEFFORDS: I object. If this is coming in now by way of offset, there is a way in which these things shall be pleaded and notice given.
By Mr. AINSWORTH: It is simply to cover the whole time he was there. We are entitled to the benefit of it. Proof of payment can be offered under the general denial.
By Mr. BARNES: It is not a set-off at all; he simply disbursed the money sent him.
By the COURT: I think it is competent for them to show that money which you charge them with as having received and not accounted for, that he disbursed it. That can be introduced without pleading offset; it is a denial of that specific indebtedness, it seems to me. Proceed. I will let the defendants amend, if I think it necessary. If they are able to show by this witness that he is entitled to that credit, I will permit the evidence, even under the pleadings as they are.
By Mr. JEFFORDS: We except.

Q. The $300 you spoke of was for the months of July, August, and September?
A. Yes, sir.
289 Q. Did he pay you any money for any other months?
A. He paid me $100 for October. I am not sure about November—I am not positive about November.
Q. Under the same authority?
A. Yes, sir; under the same authority always.
Q. Now, do you know whether the rents of the office were paid by the register and receiver or by the Government?

A. Partially by both.

Q. The charge to the Government was only so far as they had authority for it?

A. And beyond that it was an arrangement between the register and receiver. They divided the balance between them.

Q. That's all.

By Mr. JEFFORDS: No questions.

B. C. PARKER, a witness called and sworn on behalf of the defendants, testified as follows:

Direct examination.

By Mr. BARNES:

Q. Who received the rents as landlord for the office occupied by the register and receiver of the land office during the summer of 1889?

A. Myself.

290 Q. From whom did you receive the money?

A. Smith.

Q. How much?

A. Thirty-five or thirty-seven dollars; I am not sure which.

Q. Did he pay you for the month of July?

A. I couldn't tell you without looking at the receipt.

Q. Did he pay you right along?

A. He paid me for the whole year up to the time that he went away.

Q. That was December, 1889?

A. Yes, sir; the entire rent was paid.

By Mr. BARNES: That is all.

By Mr. JEFFORDS: No questions.

By Mr. BARNES: Now, under authority of that letter he charged the Government with $25.

By Mr. JEFFORDS: We admit it, as far as it goes, for one-half of the month of July. That is as far as the letter goes.

By Mr. BARNES: We rest.

By Mr. JEFFORDS: We rest.

291 "EXHIBIT A."

(Letter) "M."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 30th*, 1890.

Register and receiver, Tucson, Arizona.

SIR: I enclose herewith a statement as taken from the records of your office, showing the final proofs now in your office awaiting examination, on which the money in payment for the same was paid

to Fred. W. Smith, the late receiver, and was by him appropriated to his own use and never accounted for to the United States. You are instructed to examine all the final proofs now in your office, as shown by the accompanying list, and, if the same is found sufficient, you will request the parties in interest to furnish an affidavit, properly attested, showing that they did pay the money to Fred. W. Smith, and whether the same was paid by draft of check. If the parties can furnish certified copies of these drafts or checks from the cashier of the bank showing the same, you will obtain these copies and allow the entries as of date when proof and payment were made. You will refer on the entry papers and upon your records to this letter by initial and date as your authority therefor. The receiver will enter upon the books of his office, under the account of Fred. W. Smith, late receiver, the amount of purchase-money received for each class of entry. You will give to said entries a half-number corresponding to the time when said proof was accepted, and prepare supplemental abstracts of the same, noting thereon "allowed by letter 'M,' of April 30," and "purchase-money is to be charged to Fred. W. Smith, the late receiver." You will then prepare an account current, form 4-105 thereof, and certify therein that the transaction reported appears from the records of your office. The receiver will send a duplicate receipt to the entrymen, in accordance with the instructions herein contained, noting on the receipt, as his authority, this letter by initial and date, and after you have carefully examined all of these papers, as instructed in this letter, you will forward them to this office for future consideration.

The decision of this office heretofore has been against the allowance of an entry where the money be payable to the receiver of public monies, if the monies were not properly accounted
292 for or deposited to the credit of the Treasurer of the United States; but, as a matter of equity, in view of the general circular of this office, which provides that proof without payment must in no case be accepted or received by register and receiver, and in view of the fact that entrymen had made their payments in accordance with this circular issued by this office, it is the opinion of this office that the entries should be allowed. I am aware that the views herein expressed are in conflict with the practice above referred to, but my understanding of the law and convictions of equity are so strong and clear that, reluctant as I am to change the former practices, I feel myself compelled to do so in this case. I therefore hold that the moneys paid by entrymen to Fred. W. Smith, receiver, and received by him in his official capacity as such, were public moneys within the meaning and intent of the law, and the payment to him was a payment to the Government. The recourse of the United States is under the official bond of Mr. Smith, and, as suit has already been instituted for the recovery of the amount received by him, the entries should be allowed without further delay.

Very respectfully,

WM. STONE,
Ass't Commissioner.

List Showing Monies Paid to Fred. W. Smith, Late Receiver, with Final Proofs, Which Are Now in the Local Office Awaiting Examination.

Name.	On entry.	No. of entry.	Am'ts.
John Farson	D.	792	$320 00
F. J. Blazedel	Hd.	771	200 00
John Schoschusen	D.	474	212 00
Thomas Murphey	D.	770	40 00
Pedro Aguirrie	Hd.	1157	400 00
Daniel Turner	D.	653	160 00
Isador Asher	Hd.	781	200 00
D. Palmer	Hd.	733	100 00
Henry Percy	D. S.	1704	200 00
A. Fudenand	Hd.	619	21 00
C. Paduken	"	1195	16 00
Sed. Franklinburg	D. S.	2146	302 50
Sarah F. Clay	D.	704	80 00
W. B. Tayler	D. S.	1706	200 00
Ruben Crosby	D. S.	2289	206 00
W. E. Pomeroy	Hd.	960	200 00
L. Yesessas	Hd.	436	18 00
H. N. Lebree	D. S.	2300	183 50
293 Henry Armen	D.	469	80 00
Wm. W. Demron	D.	675	79 00
F. W. Powers	D. S.	1005	200 00
J. A. Lavoiree	D.	366	560 00
De Barth Schoob	D.	1184	1,280 00
J. V. Hazard	Hd.	.....	3 60
S. P. Vickers	D.	619	40 00
J. P. Vickers	D.	618	40 00
Jesus Aros	Hd.	363	11 00
Peter Wikleman	D.	499	40 00
John L. Story	Hd.	381	16 00
A. Corra	D.	2295	P'd, but am't not given.
H. S. Stevens	Hd.	1194	P'd, but am't not given.
N. C. Lemon	Hd.	216	16 00
O. Haskins	D. S.	1853	200 00
L. J. Hedgespeth	Hd.	262	12 00
James Keeting	D. S.	2414	200 00
W. C. Fulwilder	D.	815	640 00
S. Gonzalis	Hd.	423	12 00
Delos E. Hoffman	Hd.	633	220 00
S. Rochie	D. S.	2109	50 00
Mary Thomas	D. S.	1102	400 00

List Showing Monies Paid to Fred. W. Smith, Etc.—Continued.

Name.	On entry.	No. of entry.	Am'ts.
Henry Burress	D. S.	1859	$200 00
A. H. Hoadly	D.	780	643 80
D. E. Huffman	D.	844	250 00
W. D. Sharp	D.	810	80 00
Antonio Rodregus	Hd.	232	22 00
S. W. Pomeroy	Hd.	182	300 00
John Turkengton	D. S.	2230	200 00
H. Loapes	Hd.	812	193 65
W. A. Hancock	Hd.	.....	200 00
Arthur Marlow	Hd.	.....	200 00
J. B. George	D. S.	1962	200 00
T. E. Jones	D. S.	2128	50 00
D. D. Revis	D. S.	2350	160 00
H. Frenchler	D. S.	2336	200 00
J. S. Waddill	Hd.	560	17 00
O. J. Acena	Hd.	361	8 00
W. C. Despair	Hd.	860	200 00
C. A. Luke	D. S.	2042	200 00
W. S. Kinner	Pre.	2119	200 00
J. L. T. Waters	D. S.	1792	200 00
Letter from claimant states p'd $400; only $200 marked on original proof.			
J. H. Brown	D.	797	120 00
Thos. Davis	D.	1191	1,280 00
W. T. Hanna	D.	776	240 00
294 C. M. Copes	D.	777	80 00
S. Madrid	Hd.	213	12 00
F. J. Dysart	Hd.	783	200 00
B. Mosier	Hd.	266	12 00
Emma Sampson	D. S.	1870	10 00
H. J. Daydle	Hd.	273	18 00
John Asbell	Hd.	697	200 00
L. O. Wiley	D. S.	1869	200 00
Wm. Telfor	Hd.	147	18 00
I. G. Ward	Hd.	162	12 00
G. M. Tiffany	D. S.	2231	102 00
J. H. McClintock	Hd.	787	200 00
J. T. Hord	D. S.	1793	100 00
S. J. Horton	D. S.	1771	200 00
C. H. Slankard	T. C.	35	200 00
H. Bendal	D. S.	1382	637 00
G. B. Low	Hd.	922	206 00
T. Callardo	D. S.	2217	198 00

List Showing Monies Paid to Fred. W. Smith, Etc.—Continued.

Name.	On entry.	No. of entry.	Am'ts.
A. W. Horan	D.	1451	$80 00
T. H. Haggerty	Hd.	1060	200 00
D. W. Kean	D.	791	636 68
J. W. Herdrix	Hd.	670	19 00
A. G. Utley	D.	715	640 00
W. A. Feige	Pre.	1783	206 00
H. P. Hine	D.	705	320 00
F. W. Fry	Pre.	2137	100 00
M. M. Jackson	D.	829	80 00
V. R. Beecham	D.	827	320 00
E. A. Forrea	D.	924	200 00
O. L. Pease	D.	817	160 00
J. W. Knight	Hd.	932	11 50
H. T. Willis	Pre.	1025	100 00
J. D. Andrews	Hd.	795	10 00
Joseph Lauton	Pre.	2417	205 00
Chas. R. Rodgers	D. S.	2359	100 00
Frank Proctor	Pre.	2356	210 00
J. A. Linder	Hd.	767	10 00
R. J. De Schwenker	Hd.	691	16 00
John J. Horton	Hd.	307	12 00
J. S. Moshier	Hd.	267	12 00
J. T. Hildreth	"	747	12 00
H. M. Martenes	"	276	11 00
Chas. O'Dell	"	487	7 00
G. H. Bogan	D.	916	200 00
Total			$19,006 43

295 (Letter) M.

DEPARTMENT — INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 1, 1890.

Register & receiver, Tucson, Arizona.

GENTLEMEN: Referring to office letter "M" of the 30th ultimo, authorizing the allowance of certain entries made during the late Receiver Fred. W. Smith's term, you are instructed to transmit, in addition to the returns therein called for, monthly fee statement and detailed account of testimony, &c., fees therefor.

Very respectfully,

W. M. STONE,
Assistant Commissioner.

Approved this — day of ——, 1891, as a full and correct statement of facts in evidence in case of U. S. *vs.* Fred. W. Smith *et al.*

(Signed) RICHARD E. SLOAN, *Judge.*

296 I certify that the foregoing was handed to me as a statement of facts in the case of The United States of America *vs.* Fred. W. Smith *et al.* during the month of April, 1891, not earlier than the 7th day of said month, nor later than the 20th day of said month, by W. H. Barnes, Esq., attorney for said defendants. Said W. H. Barnes, Esq., stated at the time that after preparing the same he had been unable to obtain the approval of Harry R. Jeffords, late United States attorney for Arizona, who tried said cause, owing to the sickness and death of the latter, and requested that I approve the same as of the 15th day of March, 1891. Subsequently I signed the endorsement written above without inserting the date, purposing before filing to supply the latter by inserting the date, which the United States attorney and counsel for defendants might thereafter agree upon as the date of approval, or, in case of their failure, by inserting the date when the same was handed me for approval. Said statement has ever since it was so handed me remained in my keeping until the present day, when, upon application of said W. H. Barnes, Esq., attorney for said defendants, it is returned to him with this endorsement.

I further certify that I have examined and find the same to contain all the evidence adduced at the trial of said cause. I therefore approve the same as a correct statement of facts.

Dated April 20th, 1894.

RICHARD E. SLOAN, *Judge.*

297 I, Brewster Cameron, clerk of the district court for the first judicial district of the Territory of Arizona, do hereby certify that the foregoing is a full, true, and correct copy of the statement of facts filed in my office in the case entitled United States *versus* Fred. W. Smith *et al.*

Witness my hand and the seal of said office this 13th day of June, A. D. 1894.

[Seal District Court.]

BREWSTER CAMERON, *Clerk,*
By CHARLES BOWMAN,
Deputy Clerk.

298 Endorsed: No. 337. In the supreme court of the Territory of Arizona. Fred. Smith *et al.*, appellants, *vs.* United States of America, appellee. Transcript. Filed Jan'y 15, '95. J. L. B. Alexander, clerk. Filed April 20, 1894. Brewster Cameron, clerk, by Bowman, deputy cl'k.

299 Be it remembered that on the 15th day of January, 1894, the same being a judicial day of the January term, 1894, of the supreme court of Arizona, the following proceedings were had therein in said cause, to wit:

It is ordered that this cause be continued for the term.

300 In the District Court of the First Judicial District of the Territory of Arizona, Having and Exercising Concurrent Jurisdiction with the Circuit and District Courts of the United States.

UNITED STATES OF AMERICA
vs.
FRED. W. SMITH *et al.*

TERRITORY OF ARIZONA, *County of Pima,* } *ss:*

William H. Barnes, being first duly sworn, on oath states that he was and is one of the attorneys for defendants in this case; that immediately after the case was tried he caused B. W. Tichenor, who was the stenographer in the case, to transcribe his notes and to make a correct transcript of all the evidence in the case, and that affiant at once then prepared the statement of facts and bill of exceptions in the case; and on the 15th day of March, A. D. 1891, he submitted the same to the Hon. H. R. Jeffords, who was then the United States attorney and who tried the cause for the Government, and he said he would look at the same and pass on it, but remarked
301 that he was then sick and unable to give it his attention then, but agreeing that the defendants should lose no rights in the matter by any delay he might make, and that he would agree that it be signed *nunc pro tunc;* that with this assurance affiant left this statement of facts and bill of exceptions with him. Affiant states that thereafter said Jeffords rapidly grew worse and was confined to his bed, and was utterly unable thereafter to be consulted in the matter, and he died on or about April 3rd, 1891, and failed to pass on or consider or agree to the same.

Affiant states that his successor was Hon. Thomas F. Wilson, who had been of counsel for defendants in this case, and he declined peremptorily to consider the matter for that reason, and during his whole term of office continued to refuse.

That repeatedly affiant demanded of said Wilson that he either act in the matter himself or that he represent the facts to the Department of Justice, and that some one be delegated with power to act for the Government, but the Government failed to act in the matter; that Mr. Ellingwood, the present incumbent, refuses and has refused since his incumbency to act in the matter, and states that he will take advantage of any objection that he can raise to any statement of facts or bill of exceptions. Affiant states that as soon after the death of said Jeffords as he could decently do so he secured the statement of facts and bill of exceptions from
302 the widow of said Jeffords, and she stated that her husband in his last illness stated to her he intended to sign and agree to it, but that at no time was he able to do so.

Affiant states that the statement of facts and bill of exceptions correctly contains all the evidence in the case and all the exceptions taken during the trial. He states that on the recovering of said document from said widow he handed the same to Judge Sloan,

stating to him these facts, but just on what day affiant does not remember, and that Judge Sloan approved the same, but the date is left blank.

Affiant states that the failure to present the same and to have the same signed is due to the fault of the attorneys for the Government and not the fault of the attorneys or of the defendants; that, having offered the same to counsel for plaintiff, it should be signed and filed as of that date, viz., the 15th day of March, 1891.

That the Government should not be permitted to take advantage of its own wrong.

Affiant therefore asks that this statement of facts and bill of exceptions be signed and ordered filed as of the said date, the 15th day of March, 1891, *nunc pro tunc*, and that his honor Judge Sloan certify to the facts and attach his affidavit to his certificate and attach the same to the statement of facts. And further affiant saith not.

(Signed) WM. H. BARNES.

303 Subscribed and sworn to before me this 31st day of March, 1894.

(Signed) BREWSTER CAMERON, *Clerk*,
[SEAL.] By CHARLES BOWMAN, *D. C.*

I hereby certify that the foregoing is a full, true, and correct copy of an affidavit filed in this office on the 31st day of March, A. D. 1894.

[District Court Seal.]

BREWSTER CAMERON,
Clerk of the District Court of the First Judicial District of the Territory of Arizona,
By CHARLES BOWMAN, *D. C.*

Endorsed: No. 337. In the supreme court of the Territory of Arizona. Fredrick W. Smith *et als.*, appellants, *vs.* United States of America, appellee. Affidavit of W. H. Barnes. Filed June 27th, 1894. J. L. B. Alexander, clerk, by J. C. C. H. Boon, deputy clerk.

304 In the Supreme Court of the Territory of Arizona.

F. W. SMITH *et al.*, Appellants,
vs.
UNITED STATES OF AMERICA, Appellee. } No. —.

Motion to Affirm.

Comes now the appellee herein and moves the court to affirm the judgment of the lower court, rendered in said cause, for the reason that the only errors assigned by said appellants are that the verdict is contrary to the evidence; that the court erred in its instructions to the jury, and the court erred in admitting and rejecting certain testimony during the trial of said cause, and there is no bill of ex-

ceptions or statement of facts on file in said cause by which such alleged errors can be determined.

E. E. ELLINWOOD,
United States Attorney.

Service of a copy of the within motion is acknowledged this 14th day of January, 1895.

W. H. BARNES,
Attorneys for Appellants.

305 Endorsed: No. 337. In the supreme court of the Territory of Arizona. F. W. Smith *et al.*, appellants, *vs.* United States of America, appellee. Motion to affirm. Filed Jan'y 14, '95. J. L. B. Alexander, clerk.

306 Be it further remembered that on the 14th day of January, 1895, the same being a judicial day of the January term, 1895, of the supreme court of Arizona, the following proceedings were had therein in said cause, to wit:

It is ordered that the motion to affirm of appellee herein be set for hearing on January 15th, 1895, at 10 a. m.

307 In the Supreme Court of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
FRED. W. SMITH *et al.*, Defendants and Appellants.

TERRITORY OF ARIZONA,
County of Maricopa, } *ss:*

C. F. Ainsworth, being first duly sworn, on oath deposes and says that he is one of the attorneys in the above-entitled action; that heretofore, to wit, on or about the 15th day of June, A. D. 1894, he received a supplemental transcript, now on file in this court, by express from Tucson, containing the statement of facts.

That thereafter, to wit, during the month of June, 1894, but at just what date deponent is not able to state, he delivered said supplemental transcript and statement of facts to J. L. B. Alexander, *to* the clerk of this court, to be by him filed in this court.

That thereafter he on several occasions called on the clerk
308 of said court for the purpose of inspecting the transcript and said statement of facts; that said clerk informed this deponent that he was unable to find the same, and thought that Judge Barnes or the United States attorney had taken it from his office; that from the time said deponent filed said statement of facts with said clerk he has been unable to see said statement of facts until this 15th day of January, 1895, or to ascertain its whereabouts.

That on this 15th day of January, 1895, said supplemental transcript and statement of facts was found in the office of the clerk of this court; that this deponent if one of the attorneys for said defendants, and that for the reason that said statement of facts was

not accessible he has been unable to file any printed brief in this cause.

Deponent further says that said statement of facts should bear the filing mark as on or about the 15th day of June, 1894, instead of the 15th day of January, 1895.

Deponent further says that he has no other papers or record by which he is able to prepare a brief in said cause.

That if this court will grant reasonable time to prepare and file said brief deponent now states that he will be able to file said brief within such time as this court may in its discretion allow the attorneys for said appellants.

309 Deponent further says that this application is made in good faith and not for the purpose of delay, but that justice may be done in said cause.

C. F. AINSWORTH.

Subscribed and sworn to before me this 15th day of January, A. D. 1895.

[District Court Seal.]

J. E. WALKER,
Clerk Dist. Court.

Endorsed: No. 337. In the supreme court of the Territory of Arizona. United States of America, plaintiff and appellee, *vs.* Fred. W. Smith *et al.*, defendants and appellants. Affidavit of C. F. Ainsworth. Filed Jan'y 15, '95. J. L. B. Alexander, clerk.

310 Be it further remembered that on the 15th day of January, 1895, the same being a judicial day of the January term, 1895, of the supreme court of Arizona, the following proceedings were had therein in said cause, to wit:

The motion of appellee to affirm in this cause was argued by United States Attorney Ellinwood for appellee and by W. H. Barnes for appellants and submitted.

Whereupon the court denied said motion.

On motion of appellants' attorneys, appellants were given until January 19th, 1895, to file their brief herein, and appellee given five days thereafter to file its brief, and ordered that cause be submitted on the filing of said briefs.

311 Be it further remembered that on the 20th day of January, 1896, the same being a judicial day of the January term, 1896, of the supreme court of Arizona, the following proceedings were had therein in said cause, to wit:

This cause having been heretofore submitted and the court having taken the same under consideration, and the court having fully considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court herein be, and the same is hereby, affirmed with costs; and it is further ordered, adjudged, and decreed that the appellee herein do have and recover of and from the appellants herein and T. W. Hine and J. W. Evans,

the sureties on the appeal bond herein, its costs incurred herein in this court, taxed at the sum of twelve dollars.

312 In the Supreme Court of the Territory of Arizona.

FRED. W. SMITH *et al.*, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. } Motion to Modify Judgment.

Comes now the appellee, The United States, by its attorney, and shows to the court that the court below, in rendering its judgment in the above-entitled cause, failed to include therein interest on the amount found by the jury to be due this appellee, as prayed for in its said complaint, to wit, interest at the rate of six per cent. per annum on the sum of five thousand nine hundred and thirty-four dollars and ninety-six cents from the 11th day of April, 1890, until paid, at which last-named date the accounts between the appellant and appellee herein were duly adjusted.

Wherefore the appellee herein moves the court that the judgment of this court be modified so as to include therein interest at the rate of six per cent. per annum from the 11th day of April, 1890, until the same is paid.

E. E. ELLINWOOD,
U. S. Attorney.

313 Endorsed: No. 337. In the supreme court of the Territory of Arizona. Fred. W. Smith *et al.*, appellant-, *vs.* United States. Motion to modify judgment. Filed Jan'y 23rd, 1896. J. L. B. Alexander, clerk.

314 In the Supreme Court of the Territory of Arizona.

FRED. W. SMITH *et al.*, Appellant-,
vs.
UNITED STATES OF AMERICA, Appellee. } 337.

E. E. Ellinwood, being duly sworn, on oath says that he is attorney in the above-entitled cause, and that the costs in said cause are as follows, to wit:

For amount paid to the clerk of the district court for transcript of record and copies thereof in said cause.... ....
For — brief filed in said cause, 12 pages..... $12 00
For supreme court clerk's fees to date in said cause.....

E. E. ELLINWOOD.

Subscribed and sworn to before me this 23rd day of Jan'y, 1896.
J. L. B. ALEXANDER,
Clerk of Supreme Court of Arizona.

315 Endorsed: No. 337. Supreme court, Arizona. Fred. W. Smith *et al.*, appellant-, *vs.* United States of America, appellee. Cost bill. Filed Jan'y 23, 1896. J. L. B. Alexander, clerk.

316 And be it further remembered that on the 23rd day of January, 1896, the same being a judicial day of the January term, 1896, of the supreme court of Arizona, the following proceedings were had therein in said cause, to wit:

On motion of United States attorney, it is ordered that the judgment of this court heretofore rendered in this cause on the 20th day of January, 1896, be, and the same is hereby, modified so as to include therein interest at the rate of six per cent. per annum on the sum of $5,934.96, the amount for which judgment was rendered by the court below in this cause, from the 18th day of February, 1891, the date of said judgment in said court below, until paid.

317 In the Supreme Court of the Territory of Arizona.

FREDERICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Mariano G. Samaniego, and Sabino Oteros, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendants in Error.

TERRITORY OF ARIZONA, *County of Maricopa*, } *ss:*

Ephriam J. Bennett, Henry E. Kemp, and Wm. D. Fulwiler, each being first duly sworn, on his oaths says that he is one of the plaintiffs in error in the above-entitled cause.

That the value of the matters in dispute, exclusive of costs, in this cause exceeds the sum of five thousand dollars; that said matter in dispute is the sum of five thousand nine hundred thirty-four and $\frac{96}{100}$ dollars, as appears from the judgment rendered in the court below.

EPHRIAM J. BENNITT.
HENRY E. KEMP.
WM. D. FULWILER.

318 Subscribed and sworn to before me this 14th day of February, 1896.

[NOTARIAL SEAL.]

C. F. AINSWORTH,
Notary Public.

Endorsed: No. 337. In supreme court of Arizona. Fredrick W. Smith *et al.*, pl'ffs in error, *vs.* The United States of America, def'ts in error. Affidavit to amount in dispute. Filed Feb'y 14th, 1896. J. L. B. Alexander, clerk.

319 In the Supreme Court of the Territory of Arizona.

FREDERICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Mariano G. Samaniego, and Sabino Oteros, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Petition for Writ of Error.

Now come Frederick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Mariano Samaniego, and Sabino Oteros, plaintiffs herein, and say that on the 23rd day of January, 1896, this court entered judgment herein in favor of the defendant in error and against the plaiatiffs in error, in which judgment and proceedings had prior thereto in this cause certain errors were committed, to the prejudice of these plaintiffs in error, all of which will more in detail appear from the assignments of error which *is* filed with this petition.

320 Wherefore these plaintiffs in error pray that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript and record of proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

C. F. AINSWORTH,
W. H. BARNES,
Attorneys for Plaintiffs in Error.

Endorsed: No. 337. Petition for writ of error. Filed Feb'y 14, 1896. J. L. B. Alexander, clerk.

321 In the Supreme Court of the Territory of Arizona.

FREDERICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Marino G. Samaniego, and Sabino Oteros, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

On this 14th day of February, 1896, came the plaintiffs in error, by their attorneys, C. F. Ainsworth and W. H. Barnes, and filed herein and presented to the court their petition praying for the allowance of a writ of error intended to be urged by them; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered in said supreme court of the Territory of Arizona, duly authenticated, may be sent to the Su-

preme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof said supreme court of the Territory of Arizona does allow the writ of error upon the plaintiffs in
322 error giving bond according to law in the penal sum of twelve thousand dollars, which shall operate as a supersedeas bond.

A. C. BAKER,
Chief Justice.

Endorsed: No. 337. Allowance of writ of error. Filed Feb'y 14th, 1896. J. L. B. Alexander, clerk.

323 In the Supreme Court of the Territory of Arizona.

FREDERICK W. SMITH, HERBERT H. LOGAN, SAMUEL FRANKLIN, Lincoln Fowler, Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Mariano G. Samaniego, and Sabino Oteros, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendants in Error.

Assignments of Errors.

The plaintiffs in error in this action, in connection with their petition for writ of error, make the following assignments of errors, which were offered the court upon the hearing of the case, to wit:

1st. The court erred in affirming the judgment of the district court in and for the first judicial district of Arizona Territory.

2nd. That the court erred in refusing to reverse said cause and remanding the same to the said district court.

3rd. That this supreme court erred in not reversing the case for the errors assigned to the record and proceedings of said
324 court in the said district court as follows:

1st. The said district court erred in overruling the motion for a new trial.

2nd. For the reason that the verdict was contrary to the law of the case.

3rd. Because the verdict was not sustained by the evidence of the case.

4th. Because the court erred in refusing to charge the jury as asked by the defendants, the plaintiffs in error herein.

5th. The court erred in charging the jury as was done by the court in said trial.

6th. The court erred in admitting evidence over the objection of the defendants, the plaintiffs in error, as appears in the exceptions taken during the progress of the trial.

7th. That the court erred in excluding proper evidence offered by these plaintiffs in error, as appears by the exceptions taken during the progress of the said trial.

8th. That the court erred in permitting plaintiff to introduce im-

proper evidence over the objection of defendants, plaintiffs in error, as appears by exceptions taken during the progress of said trial.

9th. On the trial in said district court plaintiff offered in
325 evidence certain transcripts of the Treasury Department set out in the statement of facts, and the defendants objected to the same as not being on their face transcripts from the books and proceedings from the Treasury Department, but were mere balances struck from and copies of and proceedings in the Land Department of the Government; and the court overruled the objections and the defendants excepted; and the said trial court erred in overruling said objections.

10th. On the trial defendants, plaintiffs in error, objected to all evidence as to final receipts issued by the receiver of the land office at Tucson under and by authority of letter in the evidence designated as letter "M," all of which is fully set forth in the statement of facts, and the defendants excepted then and there. The ruling of said trial court was assigned for error.

4th. Said supreme court of the Territory of Arizona erred, and it is assigned for error, that said court did not reverse the said cause upon the said errors assigned and record and procedure of said trial court as set forth in the record.

5th. The said supreme court erred in allowing interest upon the said judgment from the date of its rendition in said district court up to the time that said supreme court affirmed said judgment of said district court.

326 Said plaintiffs in error therefore pray that said judgment of said supreme court of the Territory of Arizona be reversed by said Supreme Court of the United States, and that said Supreme Court be directed to reverse said judgment of said district court for the errors assigned to the said record and proceedings of the said district court in which the said cause was tried.

C. F. AINSWORTH,
W. H. BARNES,
Attorneys for Pl'ffs in Error.

Endorsed: No. 337. Assignment of errors. Filed Feb'y 14th, 1896. J. L. B. Alexander, clerk.

327 Know all men by these presents that we, Frederick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Marino G. Samaniego, and Sabino Oteros, as principals, and James T. Simms, W. T. Smith, and I. M. Christy, as sureties, are held and firmly bound unto the United States of America in the full and just sum of twelve thousand dollars, to be paid to the said United States of America or its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 4 day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the supreme court of the Territory of Arizona, in a suit depending in said court, between the United States of America and the said Frederick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Marino G. Samaniego, and Sabino Oteros, a judgment was rendered against the said Frederick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler,
328 Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Mariano G. Samaniego, and Sabino Oteros, and the said persons having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said The United States citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, sixty days after the date hereof:

Now, the condition of the above obligation is such that if said parties shall prosecute said writ of error and answer all damages and costs if they fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

FREDRICK W. SMITH. [SEAL.]
SAMUEL FRANKLIN. [SEAL.]
LINCOLN FOWLER. [SEAL.]
W. D. FULWILER. [SEAL.]
EPHRIAM J. BENNITT. [SEAL.]
JERRY MILLAY. [SEAL.]
SABINO OTERO. [SEAL.]
M. G. SAMANIEGO. [SEAL.]
N. A. MORFORD. [SEAL.]
WILLIAM CHRISTY. [SEAL.]
329 HENRY E. KEMP. [SEAL.]
HERBERT H. LOGAN. [SEAL.]
W. J. MURPHY. [SEAL.]
J. T. SIMMS. [SEAL.]
W. T. SMITH. [SEAL.]
I. M. CHRISTY. [SEAL.]

Approved by—
A. C. BAKER,
Chief Justice.

330 Everett E. Ellinwood, U. S. attorney.

DEPARTMENT OF JUSTICE,
OFFICE OF UNITED STATES ATTORNEY FOR
ARIZONA TERRITORY, PHŒNIX, 3, 17, '96.

Hon. A. C. Baker, chief justice, Phœnix, Arizona.

DEAR JUDGE: I have examined the enclosed bond and have no objections to the same.

Resp'y,
E. E. ELLINWOOD, *U. S. Att'y.*

Endorsed: No. 337. Appeal bond. Filed March 14th, 1896. J. L. B. Alexander, clerk.

331 In the Supreme Court of the Territory of Arizona.

FRED. W. SMITH *et al.*, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee.

Appeal from the district court of the first district for the trial of causes arising under the laws and Constitution of the United States, sitting at Tucson, Arizona—Justice R. E. Sloan, judge.

Affirmed.

W. H. Barnes, C. F. Ainsworth, and John R. Martin, for appellants; E. E. Ellinwood, for appellee.

Opinion by HAWKINS, *A. J.*:

This was an action brought against Fred. W. Smith and the sureties on his official bond as receivers of public moneys in the
332 Tucson land district in this Territory, dated the 7th day of March, 1888, for the sum of $30,000.00, the condition of which is that he "shall at all times during his holding and remaining in said office carefully discharge the duties thereof, and faithfully disburse all public moneys and honestly account without fraud or delay for the same, and for all public funds and property which shall or may come into his hands."

The Government claimed in its complaint that the bondsmen were liable for various and sundry sums which came into the hands of said receiver, aggregating over $19,000.00.

At the time persons having made entry and applying for final proof to obtain patents they each handed to the receiver one dollar per acre, to be applied by him when final proof was passed upon to the Government if the proof was allowed, and to be returned to entryman if proof was disallowed. The receiver gave no receipt for the money. This seems to have been prohibited, yet there was also a rule of the department that "proof without payment must in no case be accepted."

The moneys derived from this source amounted to about $40,000.00 in the hands of Smith when he went out of office. Of this money about $25,000.00 was by Smith, through defendant Christy, returned to persons who had handed the same to Smith.

333 This state of affairs is said to have been caused for the reason that at the time so many persons were presenting their proofs and handing in their payments to Receiver Smith there was no register, or Register Duff was in such ill health as to be unable to attend to the duties of his office. As a consequence, this vast amount of money was paid in to said receiver by persons desiring to enter land at the time of presenting their proof.

This was the state of chaos in which Receiver Drake found the office when he took charge as receiver. A large number of persons

who had presented proof to and made payment to Receiver Smith while in the charge of the said office, finding their proof accepted, made repayment to Receiver Drake. Then there were a number of cases where final proof had been made and presented to Smith while receiver and in which entrymen, in accordance with regulations, had handed payment to Smith. At the time these cases were reached by the successor in office of Smith and ready to be passed upon in favor of entrymen, for want of the money the officers of the land office were withholding patents or final receipts from the entrymen. This was done by the local land officers for the reason that the rulings of the General Land Office theretofore were that such payments made before entry had been allowed and certificate given simply
334 made the receiver of the land office the agent of the entrymen and were not public moneys.

As stated, a number of persons under this regulation made repayment to Receiver Drake; others, having made payment once to the agent of the Government and under the rule that "proof without payment must in no case be accepted," demanded their certificates.

The state of affairs being reported to the General Land Office, acting Commissioner Stone changed the former rulings of the General Land Office, as will be seen by the following letter:

"*Letter 'M.'*

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *April* 30, 1890.

"Register and receiver, Tucson, Arizona.

"SIR: I enclose herewith a statement as taken from the records of your office, showing the final proofs now in your office awaiting examination, on which the money in payment for the same was paid to Fred. W. Smith, the late receiver, and was by him appropriated to his own use and never accounted for to the United States. You are instructed to examine all the final proofs now in your office, as shown by the accompanying list, and, if the same is found sufficient, you will request the parties in interest to furnish an affidavit, properly attested, showing that they did pay the money to Fred. W. Smith, and whether the same was paid by draft or check. If the parties can furnish certified copies of these drafts or checks from the cashier of the bank showing the same, you will obtain these copies and allow the entries as of date when proof and payment were made. You will refer on the entry papers and upon your records to this letter by initial and date as your authority therefor. The receiver will enter upon the books of his office, under the account
335 of Fred. W. Smith, late receiver, the amount of purchase-money received for each class of entry. You will give to said entries a half number corresponding to the time when said proof was accepted, and prepare supplemental abstracts of the same, noting thereon, "Allowed by letter 'M' of April 30," and purchase-money is to be charged to Fred. W. Smith, the late receiver. You

will then prepare an account current, form 4–105, thereof and certify therein that the transaction reported appears from the records of your office. The receiver will send a duplicate receipt to the entrymen in accordance with the instructions herein contained, noting on the receipt as his authority this letter by initial and date, and after you have carefully examined all of these papers as instructed in this letter, you will forward them to this office for future consideration.

"The decision of this office heretofore has been against the allowance of an entry where the money be payable to the receiver of public moneys if the moneys were not properly accounted for or deposited to the credit of the Treasurer of the United States; but, as a matter of equity, in view of the general circular of this office, which provides that proof without payment must in no case be accepted or received by register and receiver, and in view of the fact that entrymen had made their payments in accord- with this circular issued by this office, it is the opinion of this office that the entries should be allowed. I am aware that the views herein expressed are in conflict with the practice above referred to, but my understanding of the law and convictions of equity are so strong and clear that, reluctant as I am to change the former practices, I feel myself compelled to do so in this case. I therefore hold that the moneys paid by entrymen to Fred. W. Smith, receiver, and received by him in his official capacity as such, were public moneys within the meaning and intent of the law, and the payment to him was a payment to the Government. The recourse of the United States is under the official bond of Mr. Smith, and, as suit has already been instituted for the recovery of the amount received by him, the entries should be allowed without further delay.

"Very respectfully, WILLIAM STONE,
"*Assistant Commissioner.*"

336 The ruling contained in this letter seems to have been a complete change in the prior decisions and rulings of the Department of the Interior. See—

Ward *v.* Mathison, 6 Land Decisions, 714.
Lady Bryan S. M. Co., 2 Land Decisions, 673.
In re Harris, 8 do., 77, 78.

The appellants contend that these regulations, rulings, and decisions were the law when the bond was given and a part of the contract between the sureties on the bond and the Government.

The court below held otherwise, and, we think, properly, as, notwithstanding the rules, the proof clearly shows and it is practically admitted that Smith received the sum for which judgment was entered as receiver of public moneys at the Tucson land office for the sale of public lands, and no other purpose. Smith admits this to Brown, the register, and exhibits to him (Brown) annotations made by himself on the final proof papers as they were received, charging himself with the amount so received in his official capacity. Could any one contend that if Smith had been in the office at the time these cases were reached and decided, and with these official

notations on the papers showing payment to him, that the entrymen would not be entitled to his certificate? If the entrymen would be entitled to his certificate because the proof had been found
337 sufficient and the payment found made when the proof was presented, then, if the receiver failed to turn the money into the treasury for such public lands sold, he is liable upon his bond for same, and the sureties must be held. The moneys thus received from entrymen were public moneys, paid to and received by Smith as receiver, as the authorized agent of the Government, as a consideration for title to portions of the public domain, and upon such payment the Government issued final receipts, accepting same as payment for the land filed upon, and issued patents, thus parting with its title. This was done under the ruling of letter "M." This was a new regulation, and we think is within the provisions of sec. 161, R. S. U. S., providing for a different rule of practice in the General Land Office. If not, it certainly correctly construes the law in relation to payment of these moneys to Smith, receiver, and the same being received by him in his official capacity, being public funds, and that such payment to him by the entrymen was a payment to the Government.

Such change in the former practice did not release the sureties. Was Smith liable to the Government for this money received by him in his official capacity? No one, we think, would hardly seriously contend that he was not. Then how could the surety escape? For it is an elementary rule that a surety in a bond is liable to the same extent to which his principal is liable by force of the bond.

338 If, after an official bond has been signed, the nature of the office be changed by law, the bond ceases to be obligatory on the theory that the office is no longer the same.

U. S. *vs.* Gaussen, 97 U. S., 584.

There is no pretense that there was any change made in the duties of the office of receiver, but the claim is a change in the ruling of the department which holds the sureties. Suppose Congress had passed a law saying that money paid by entrymen to receivers when presenting their final proofs to registers and receivers were public moneys and this act had been passed after the giving of the bond, this would not release sureties. Mr. Commissioner Stone simply overruled decisions and regulations made by his predecessors. He was authorized, as we have stated, under sec. 161, R. S. U. S., to change the rules and regulations of his department.

If sureties on official bonds were discharged by every change in the law relating to the duties of the person holding office, it would be of little use to obtain sureties.

U. S. *v.* McCarty, 1 Fed. Rep't'r, 104, and numerous cases cited by the court in that decision.

There seems to be a rule of the Treasury Department requiring receivers of public moneys to deposit whatever sums come into their hands to the credit of the United States with a United
339 States depository whenever the amount reaches one thousand dollars. It could hardly be contended that the failure of a

receiver to comply with this rule would release the sureties. Laches is not attributable to the Government. Mr. Justice Story, in U. S. *v.* Kirkpatrick, 9 Wheat., 720, uses the following language:

"The supposition that laches will discharge the bond cannot be maintained as law. Laches is not imputable to the Government, and this maxim is founded not in the notion of extraordinary prerogative, but upon great public policy.

"The Government can transact its business only through its agents, and its fiscal operations are so various and its agencies so numerous and scattered that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches can be applied to its transactions."

It is assigned as error the admission of the bond of Smith and his sureties in evidence at the trial of the cause, for the reason that the statutes required a bond for ten thousand dollars, and the bond in question is for the sum of thirty thousand dollars, on a claim that the same was extorted from Smith under duress.

The evidence in the case does not bear out this view. It shows that the bond was increased from ten thousand dollars to thirty thousand dollars by direction of the President of the United States, and sets out the letter of the Secretary of the Interior to that effect.

340 It was unquestionably a voluntary bond taken by the proper officers of the proper department of the Government, and the right to take such a bond is an incident to the duties belonging to such department.

Tingley *v.* U. S., 5 Peters, 115.
U. S. *v.* Bradley, 10 " 343.
U. S. *v.* Hodson, 10 Wall., 395.

It is also contended that the court below erred in permitting the item of $1,692.00 to go to the jury for their consideration, the same being charged against Smith for a draft of that amount issued to Smith as receiver. The reason of this alleged error is that appellant Christy asked one McConnell, an inspector of the Interior Department, on the 12th of January, 1890, to telegraph to the Treasury Department to stop payment, and he refused to do so. This draft appears to have been issued to Receiver Smith on October 5, 1889, when he was in office, and delivered to him by his clerk upon his return from leave of absence, and Smith put the same in his pocket.

We are unable to see any obligation upon the Government to stop payment. This was a negotiable instrument and had probably long before passed out of the hands of Smith into other hands. Besides, the Government could not be bound by any statement or admission of Inspector McConnell. His laches could not be imputed to the Government.

U. S. *v.* Kirkpatrick, 9 Wheat., 720.

341 The Treasurer's transcript, duly certified under section 886, Revised Statutes of the United States, was properly admitted in evidence in the court below, and was by virtue of such statute evidence of all things therein contained which came within the offi-

cial knowledge of the accounting officers of the Treasury Department.

The judgment is affirmed.

JNO. J. HAWKINS,
Associate Justice.

We concur:

A. C. BAKER, *C. J.*
J. D. BETHUNE, *A. J.*
OWEN T. ROUSE, *A. J.*

Endorsed: No. 337. Opinion. Filed June 22, 1896. J. L. B. Alexander, clerk.

342 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in Washington within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Arizona, wherein Frederick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, Wm. J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Mariana G. Samaniego, and Sabino Oteros are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Issued by—

A. C. BAKER,
Chief Justice of the Supreme Court of the Territory of Arizona.

Service of the above citation admitted this 29th day of June, 1896.

E. E. ELLINWOOD,
U. S. Attorney.

[Endorsed:] No. 337. Fred. W. Smith *et al.*, plaintiff- in error, *vs.* United States of America, defendant in error. Citation. Lodged with me this 30 day of June, A. D. 1896. J. L. B. Alexander, clerk supreme court of Arizona.

343 UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

I, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record and all proceedings in the cause entitled United States of America against Frederick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Mariano G. Samaniego, and Sabino Otero, as the same appears of record and on file in my office; also that the writ of error and citation herewith and hereunto attached are the original writ of error and citation issued in said cause in the supreme court of the Territory of Arizona.

Seal Supreme Court of Arizona.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court this 30th day of June, A. D. 1896, at Phœnix, the capital of the Territory of Arizona.

J. L. B. ALEXANDER, *Clerk.*

344 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Arizona, before you or some of you, between Fredrick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, William D. Fulwiler, Ephriam J. Bennett, William Christy, Marino G. Samaniego, and Sabino Oteros, plaintiffs in error, *vs.* The United States of America, defts in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, Fredrick W. Smith, Herbert H. Logan, Samuel Franklin, Lincoln Fowler, William J. Murphy, Henry E. Kemp, Jerry Millay, Nathan A. Morford, Wm. D. Fulwiler, Ephriam J. Bennett, Wm. Christy, Marino G. Samaniego, & Sabino Oteros, as by their complaint appears, we, being being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within — days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Seal Supreme Court of Arizona.

United States, the 10th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

J. L. B. ALEXANDER,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed by—

A. C. BAKER,
Chief Justice of the Supreme Court of the Territory of Arizona.

345 [Endorsed:] No. 337. In the supreme court of the Territory of Arizona. Fred. W. Smith *et als.*, plaintiffs in error, *vs.* United States, defendant in error. Writ of error. Lodged with me this 10th day of June, A. D. 1896. J. L. B. Alexander, clerk supreme court of Arizona.

Endorsed on cover: Case No. 16,354. Arizona Territory supreme court. Term No., 212. Frederick W. Smith, Herbert H. Logan, Samuel Franklin, *et al.*, plaintiffs in error, *vs.* The United States. Filed August 4th, 1896.

No. 212.

Brf. of Payson & Barnes for Ap

DEC 18 1897
JAMES H. McKENNEY

212

Filed Dec. 18, 1897.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

FRED. W. SMITH *et al.*, *Appellants*,
vs.
THE UNITED STATES, *Appellee.*

Appeal from the Supreme Court of Arizona.

BRIEF AND ARGUMENT FOR APPELLANTS.

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STATEMENT OF CASE.

This was a suit brought by Appellee upon the official bond of Fred. W. Smith, as Receiver of Public Moneys at Tucson, Arizona.

Smith was appointed to this position February 28, 1887, and on March 7, 1888, with the other appellants as his securities, gave the bond upon which this suit is brought, the penalty in the bond being $30,000:

The condition was as follows:

"The condition of the foregoing obligation is such that:

"Whereas, the President of the United States has appointed the said Frederick W. Smith to be receiver of public moneys at Tucson, Arizona, by commission dated February 28th, 1887, and said Frederick W. Smith has accepted said appointment:

"Now, therefore, if the said Frederick W. Smith shall at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys and honestly account without fraud or delay for the same and for all public funds and property which

shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue"; and signed by the defendants.

Smith was retained in the office until the latter part of November, 1889, when he was removed, and Charles R. Drake was appointed his successor. He assumed the duties of the office, taking charge of books and papers on December 3, 1889.

During the early part of Smith's incumbency there was no Register of the local land office.

Then one Duff was appointed Register, but by reason of ill-health was unable to give attention to his duties.

Mr. Herbert Brown was appointed Register of this office July 17, 1889.

Smith was in poor health during 1889, and as the result of this general condition in the office during the summer and fall of 1889, a vast amount of business had accumulated in the land office at Tucson undisposed of.

An immense number of entries of public land had been made there; and as is well understood, passing upon the "final proofs," and all the numerous questions of fact connected therewith, determining regularity of papers, etc., etc., requires concerted action by the Register and Receiver.

If all is found to be regular, the Register issues his certificate which goes to the General Land Office; the Receiver takes the payment due for the land and gives what is known as the "final receipt," which, showing payment, goes to the entryman, and upon both, the patent for the land ultimately issues.

The execution of these papers are simultaneous acts, of even date, always.

During Smith's term, as stated, very little was done in the way of passing upon "final proofs."

Large numbers, upon different entries, were "submitted" to the local office, but the officers were not prepared to act

upon them, so this class of business, unacted upon, largely accumulated.

As each entryman presented his paper on "final proof" he gave to the receiver the necessary amount, to pay the balance due on the land, in case the "final proofs" should be accepted and the final certificate and "receipt" issue, in these cases usually one dollar per acre, besides fees.

This money, of course, would go to the Government if the "proofs" should be allowed, and be returned by the receiver to the entryman if the "proofs" should be rejected or the entryman should change his entry or relinquish altogether.

The receiver gave no receipt for this money; the rules of the General Land Office prohibited that.

No account of such moneys was kept, or required to be kept, as between the receiver and the Government.

It was never deposited as "public money," nor in any way treated as money with which the Government had any interest until after "final receipt" actually issued and the entryman vested with an equitable interest in the land shown upon paper; then, for the first time, would the money appear in the accounts as "public money," and be deposited to the credit of the Treasury.

This was the constant, uniform practice until after April 30, 1890, when "Letter M," to be referred to later, was promulgated from the General Land Office.

Under this state of circumstances and of practice, Smith received, before he went out of office, December 3, 1889, about $40,000.

Upon learning of Smith's removal from office, and the fact of his being the depository of large sums of money, in this way, being a matter of common knowledge, and Smith being insolvent as well, Mr. Christy, one of appellants, sought Smith to secure what he could for ultimate protection in case of established liability.

He got from Smith $25,000 about December 1, 1889.

In November, 1889, one Harlan, as an officer of the Government, from the Department of the Interior, came out to Tucson "to take charge of the office and settle up with Smith as Receiver" (Transcript, p. 119).

Mr. Christy, in behalf of himself and the other securities upon this bond, saw Harlan a number of times as to Smith's accounts as receiver, and he said "Mr. Smith's accounts were straight and he did not owe the Government a dollar" (Tr., p. 120).

Mr. Christy says (p. 120), "I went to him and told him that I had come in the interest of the bondsmen; that I had received $25,000 from Fred. W. Smith, and that I was prepared to settle any balance that I found due the Government, and he replied that there was no balance due."

After this assurance Mr. Christy proceeded to refund to entrymen who had deposited with Smith their several deposits until the $25,000 was exhausted.

So matters went on until April 30, 1890.

There were a large number of cases pending on "final proofs" submitted to Smith, in which the money deposited had not been refunded by Christy, and for want of payment to Drake the local officers were withholding the final papers.

Not a single case of entry involved in this record had been acted upon up to this date, not one; and every "final receipt" was issued *after* this date.

Will your Honors bear in mind, this was nearly five months after Smith had been removed and his successor had been in possession and down to this time (confessedly below, and it will not be denied here, I believe) the Government not only made no claim to a dollar of the money so deposited with Smith, but it had been the settled, uniform course and holding of the Interior Department and of the General Land Office that under the law "moneys are not payable to a receiver of public moneys until an entry has been allowed by the register and a certificate given.

"Any moneys placed in the hands of a receiver or sent to

him, to be afterwards applied to an entry, are not moneys lawfully paid to the receiver, for which the United States is responsible, but are simply individual deposits in the nature of a personal trust. Such moneys are not received officially. They can be received by the receiver only in his personal capacity, as a private individual, and recourse for such deposits must be had against him personally by the parties aggrieved." (6 L. D., 714.)

It was always held that no official relation attached to such moneys until the "entries of lands claimed were actually allowed." (*Idem*, 714.)

The official decision of the Secretary of the Interior, in every case presented to him involving the question here (and they are numerous, and will be cited in the argument later), down to and including the Dysart case, 23 L. D., 282, are uniform, that the payment of the purchase price of land to the receiver *before the acceptance* of final proof is at the risk of the purchaser," that until a formal acceptance of "final proof," and the issue of "final receipt" there was no sale or final entry of the land, and the money remained the private property of the entryman.

But on April 30, 1890, in view of the condition at Tucson, the Commissioner of the General Land Office made a ruling, shown by "Letter M," *infra*, in which he not only laid down a new rule as to future practice, but while confessedly overturning the settled rule above stated, sought to apply the newly created liability to transactions occurring in Smith's time, although Smith had been out of office nearly five months.

This is the letter:

"LETTER M." DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C.,
April 30th, 1890.

Register and Receiver, Tucson, Arizona:

SIR I enclose herewith a statement as taken from the records of your office showing the final proofs now in your

office awaiting examination, on which the money in payment for the same was paid to Fred W. Smith, the late Receiver, and was by him appropriated to his own use, and never accounted for to the United States. You are instructed to examine all the final proofs now in your office, as shown by the accompanying list, and if the same is found sufficient you will request the parties in interest to furnish an affidavit, properly attested, showing that they did pay the money to Fred W. Smith, and whether the same was paid by draft or check. If the parties can furnish certified copies of these drafts or checks from the cashier of the Bank showing the same, you will obtain these copies and allow the entries as of date when proof and payment were made. You will refer on the entry papers and upon your records to this letter by initial and date, as your authority therefor. The Receiver will enter upon the books of his office, under the account of Fred W. Smith, late Receiver, the amount of purchase money received for each class of entry. You will give to said entries a half number corresponding to the time when said proof was accepted, and prepare supplemental abstracts of the same, noting thereon "Allowed by Letter 'M' of April 30," and purchase money is to be charged to Fred W. Smith, the late Receiver. You will then prepare an account current, form 4-105 thereof, and certify therein that the transaction reported appears from the records of your office. The Receiver will send a duplicate receipt to the entrymen, in accordance with the instructions herein contained, noting on the receipt as his authority, this letter by initial and date, and after you have carefully examined all these papers, as instructed in this letter, you will forward them to this office for future consideration.

The decision of this office heretofore has been against the allowance of an entry where the money be payable to the receiver of public moneys, if the moneys were not properly accounted for or deposited to the credit of the Treasurer of the United States. But, as a matter of equity in view of the general circular of this office, which provides that proof in no case must be accepted or received by Register and Receiver, and in view of the fact that entrymen had made their payments, in accordance with this circular issued by this office, it is the opinion of this office that the entries should

be allowed. I am aware that the views herein expressed are in conflict with the practice above referred to, but my understanding of the law and convictions of equity are so strong and clear, that, reluctant that I am to change the former practices, I feel myself compelled to do so in this case. I therefore hold that the moneys paid by entrymen to Fred W. Smith, Receiver, and received by him in his official capacity as such, were public moneys within the meaning and intent of the law, and the payment to him was a payment to the Government. The recourse of the United States is under the official bond of Mr. Smith, and as suit has already been instituted for the recovery of the amount received by him, the entries should be allowed without further delay.

Very respectfully,

WILLIAM STONE,
Assistant Commissioner.

That this letter and ruling therein contained was a complete revolution of the course of business of the Department of the Interior and General Land Office and alters the instructions and the decisions of the same, we will show later, in detail.

This letter, in terms, applies to the Tucson District. No circular fixing a general practice as to such moneys as these was issued from the General Land Office until May 14, 1895, when this order was promulgated.

M. DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., *May 14, 1895.*

To Registers and Receivers,

GENTLEMEN: From and after June 30, 1895, a uniform detailed record must be kept by the receiver and monthly report made to the Commissioner of the General Land Office of unearned fees and unofficial moneys received, re-

turned, and on hand at each local land office, consisting of moneys received as fees or commissions or in payment for land in cases where the applications to file or enter are incomplete or can not be allowed for any reason and of amounts deposited under the act of May 14, 1880, for giving notice of cancellation of entry in contest cases, and of all moneys deposited as security for the cost of transcribing testimony in contest cases, together with a statement of the amount refunded or reported in quarterly contest account in each case.

To this end I have caused to be sent you a special register, form No. 4–986, in which will be entered all such moneys received by you, the disposition made of the same and the amount on hand at the end of the month, and special form of statement thereof, form No. 4–541, for monthly report to this office, which report shall be a complete abstract of the record herein required.

All such unearned fees and unofficial moneys must be promptly returned to the parties from whom received or their legal representatives. The practice of holding the moneys paid in such cases, subject to the order of the applicant until the papers in the application are perfected or completed, is contrary to existing regulations and must be discontinued.

The record herein required to be kept must show the receipt and return of all such moneys. All moneys deposited for register's fee of notice of cancellation in contest cases, and all deposits for reducing testimony to writing in contest cases must be reported and all amounts returned to the depositor or paid for clerical services under act of August 4, 1886, or earned and carried into the register of cash receipts and balances must be entered in the proper column and under proper dates.

In connection with the receipt of moneys at the district land offices, you are advised that registers of the land offices have no right officially to receive any moneys whatever except such as are paid to them by receivers as salaries, fees, and commissions. Should any money be forwarded to the register or paid to him, he will at once pay over the

same to the receiver, as the latter is the proper officer to receive all moneys sent to the local land offices.

Very respectfully,

W. S. LAMOREUX,
Commissioner.

Approved:

WM. H. SIMS,
Acting Secretary.

It will be observed that even here such moneys are regarded as "*unofficial moneys*," and that is the rule to this date. To this hour such moneys are, by direct order, treated and held as "unofficial moneys."

For many years next preceding May 14, 1895, the only form of account kept by receivers under express direction of the Treasury and Interior Departments was this, as to credits to the United States, showing the only public moneys the receiver could have derived from disposition of public lands.

Under bond dated.....
The United States,
In account with Receiver of Public Moneys at.....

	Cr.
By balance due United States, as per last report.....	.....
" Sales of Public Lands.....acres, embracing Cash Entries No.....to No.....inclusive...	.....
" Sales of Mineral Lands,.....acres, embracing Entries No.....to No..... inclusive...	.....
.....	.....
.....	.....
By Fees received on.....Preemption Declarations.....	.....
" " " " ..... Homestead Declarations.....	.....
" " " " .....Mining Applications.....	.....
" " " "	.....
" " " "	.....
" " " " .....Homestead Entries.....	.....
" Commissions received on.....acres embraced thereby...	.....
" " " " .....Final Homesteads...	.....
" Fees received on Timber-culture Entries.....	.....
" Commissions received on.....acres embraced thereby...	.....
" " " " .....Final Timber-culture Entries	.....
" Fees received on.....	.....
" " " "	.....
" " " "	.....
" " " "	.....

This was the technical, legal form used in the accounts of receivers at local land offices, and included everything which such officers could receive as "public moneys."

No reference was ever made in any statement of account by a receiver at a local land office to moneys, such as are involved in this phase of this suit until after May 14, 1895. Since then, an account of such moneys has been kept on the books at the local land office, and regular returns made therefrom as to such moneys; but, under the circular, and in the accounts they are held and referred to as "*unofficial moneys*," as recited in the circular above, never as "public" or "official moneys."

The heading of the official form of the account as to "unofficial money," is as follows:

Detailed monthly statement of unearned fees and unofficial moneys received, earned, disbursed, or returned, and on hand for the month ending....., 189.., at the United States Land Office at ....., embracing fees or commissions, or payments for land in cases where applications to file or enter are incomplete or can not be allowed for any reason, and of amounts deposited for publication of notice, and as fees for notice of cancellation, and of all moneys deposited as security for cost of transcribing testimony in contest cases, together with a statement of amount refunded, paid publishers, or reported in Receiver's account.

The official form, in its footing, is as follows:

Total amount of unearned fees and unofficial moneys on hand to date, $.....

I certify that the foregoing is a correct statement of all unearned moneys received, returned, paid publishers, or reported in Receiver's account, and of amount on hand at the end of said month.

.....
Receiver.

Even to this date, these moneys are not treated as *public*, only as "*unofficial*," and therefore not *public*. Very clearly it would have been improper to credit the United States with moneys like those in suit, because every item in the forms provided was for actual cash *belonging to the United States*, to be then covered into the Treasury. These unofficial moneys were only in his hands *sub modo*, to await action upon

the "final proofs;" in the meantime the entry could be abandoned, or relinquished, in which case the money would be returned to the entryman without any order from the General Land Office. In like manner, if the proofs should fail, the Government had no rights to the funds, so that as uniformly held by the Secretary of the Interior, the status of the deposit, until "final receipt" was ready, was purely a matter between the entryman and the receiver.

The old form of keeping the accounts as to *public money*, as shown above, is still retained; that as to "unofficial moneys" is a separate matter, and so kept; one account as to "public moneys" and another as to "unofficial moneys." That is to say, prior to April 30, 1890, uniformly the General Land Office gave itself no concern as to cash deposited with a receiver pending an examination of "final proofs," because it announced and held, as did the Secretary of the Interior repeatedly, that the cash did not become public money until approval of "final proof" and the giving of "final receipt," when the Government parted with something, viz, an official paper evidence of legal interest or equity in the land on which patent should issue.

"Letter M" was based on Commissioner Stone's idea of equity in that particular case; but since then, such cash, so deposited, is officially declared not to be "public money," but "*unofficial money*." And prior to the reports under the circular of May 14, 1895, beginning with the fiscal year of 1896, neither the Treasury nor the Interior Department had anything of record, nor was it required that the receiver should have of record anything to show these deposits, for the obvious reason that they *were* not, and were not regarded as "*public* moneys."

The Government claimed below that the securities were liable for the amount of money deposited by the several entrymen with the submission of their "final proofs," in

accordance with the terms of "Letter M," and the court below sustained that view.

While there are some other questions presented by the record, the liability of these sureties upon this state of fact and Departmental rulings will be the only subject discussed in this brief.

I.

The moneys in question were not "public moneys."

The expression "public money" is self-defining.

It means money belonging to the people—to the Government, and when in the hands of a receiver, subject, on the instant, and at all times, to the order of the Secretary of the Treasury, and to be paid out for any public purpose, as authorized by law.

Elaboration can make this no plainer.

It was the duty of the receiver, Smith, to keep a faithful and true account of all public moneys which should come to his hands, and a form of account, as shown above, adopted by the Treasury and in use for years, and to this date, was used by him, which form shows every item of public fund which can possibly come to his hands as receiver.

This money was not of a character that could be entered upon that form.

It was not derived from *sale* of public land.

That item means, a sale consummated, as is well-known.

The account could properly show only money, actual cash, which, when entered on the account legally belonged to the United States, and which should at once be covered into the Treasury.

These deposits were made, not as a present payment, but as a deposit, *sub modo*, with the distinct understanding that the money was not to go to the Government, unless the proofs were approved, and a "final receipt" issued by the receiver.

The Government could not possibly have any legal interest in the money until then; it parted with nothing until "final receipt;" it could at any time, before the issue of the "final receipt," withdraw the land from disposition and put it to any other use, and the entryman have no legal right to complain.

This Court has repeatedly so decided.

Frisbie *vs.* Whitney, 9 Wall., 187.
Yosemite Valley Case, 15 Wall., 77.
Campbell *vs.* Wade, 132 U. S., 34.

These cases establish the doctrine, that the Government is not bound, until every preliminary step has been taken and been passed upon by the executive officers and the case closed.

As said in Frisbie *vs.* Whitney, "a vested right under the pre-emption laws is only obtained when the purchase money has been paid and the receipt of the proper land officer given to the purchaser."

Until then, as said by Mr. Justice Field, in Campbell *vs.* Wade, "the application to enter did not bind the applicant to proceed any further in the matter, nor could it bind the State to sell the lands."

Up to the date of finally approving the 'final proofs" and the issue of the "final receipt" not only is the Government not bound, but the entryman may abandon, or relinquish, and, of course, beyond question, the money, simply deposited, remains the money of the entryman until both the Government and he are bound.

Assuredly, the money could not be credited to the United States in the account of the receiver until the land was *sold, disposed of*, so that, reciprocally, the entryman received the evidence of the disposal of the land, which can only be

shown by the register's "certificate" and the receiver's "final receipt."

Under the statute, the receiver can only be held for "public money or property," and this money, so in Smith's hands, never became *public* property, for nothing was done by Smith as to the "final proofs"; every one upon which "final receipt" issued, involved in this record, was passed upon by Drake long after Smith went out of office, and by authority of "Letter M."

In view of this deferred action, let us consider this phase of the case.

The Government insists that because Smith was receiver and the object of the deposit was to secure title to public land, the acceptance of the deposit made it public money.

If that be so, then every dollar deposited became public funds, whether the "final proofs" were approved or not.

It cannot be claimed that the Government can legally get something for nothing; that it can get title to the citizen's money before it parts with its interest in the land proposed to be sold.

The argument proves too much.

The truth is, *all* is mere *proposal* on both sides until final certificate and receipt, till then the money is not "public;" the land is not private, but "public," and the status of both is changed by the execution of the papers named, and not until then.

Tested in another way:

If this was "public money," Smith and these sureties were liable for it on December 3, 1889, when he went out of office, for the liability of all was fixed by the status of the money at that date. That is clear.

Suppose suit had been brought then; no "Letter M" had been written, the rule that the deposit was a personal one, between the several entrymen and Smith as receiver,

until "final receipt" was operative; there was no statute then *nor now*, providing for or allowing such deposits as public matter; and suppose further, that the case had been brought to trial before any "final proofs" had been passed upon, or any "final receipts" issued by Drake.

Not a dollar could be recovered at such a trial in that state of case for the obvious reason at the threshold: that the Government had parted with nothing, and was not bound to part with anything in the land, and, besides, *non constat*, that any of the proofs would be approved, and if so, the Government would have its land and an adjudged legal title to the money as well.

Absurdity could go no further.

II.

THE LIABILITY OF THESE SURETIES IS FIXED BY THE STATUS OF AFFAIRS WHEN SMITH WENT OUT OF OFFICE DECEMBER 3, 1889.

If these moneys were not "public moneys" *then*, which might have been and should have been covered into the Treasury *then*, and which could properly be used for any public purpose, in such case these sureties are not liable.

Mr. Commissioner Stone could not in April, 1890, by Letter M, create a liability which theretofore did not exist.

A new rule in a Department cannot create a liability as to past transactions and be made to apply to one no longer in office.

Suppose, your Honors, that the office of receiver had been abrogated by law December 3, 1889, and the land office at Tucson closed at that date.

The Government was not bound to go on, as to unperfected entries, but could abandon them all, leaving everything in the status of December 3, 1889, and whatever that was, as

fixed either by express statute, general rule of law, or by proper regulation of the Interior Department, rights and liabilities would be determined.

There is no provision of statute governing the case in hand.

There is no general rule of law differing from our contention here.

The regulations of the Department were all to the point and effect that the Government did not have, nor claim any, interest in the final deposit until "final receipt" was ready, or at most until the local land officers were jointly ready to act.

Lady Bryan Silver Mining Co., 2 L. D., 673.

"Moneys are not payable to a receiver of public moneys until an entry has been allowed by the register and a receipt given. Any money placed in the hands of a receiver, to be afterwards applied to an entry are not moneys lawfully paid to the receiver for which the United States is responsible, but are simply individual deposits in the nature of a personal trust.

"Such moneys are not received officially. * * *

"They can be received by the receiver, only in his personal capacity as a private individual, and recourse for such deposits must be had against him personally by parties aggrieved."

"The receiver has no authority to receive money except when tendered in payment, upon an application made to the register, for the purchase of lands upon which the local officers are ready to act."

"A payment, received by the local officers in advance of the time when they are ready to act upon the application and allow the entry, is not in pursuance of any duty enjoined by law, and a failure to account for such sum, in the event the application is refused, is not a default as to any obligation due the Government, and the sureties would not be liable therefor.

"In the case under consideration, the money was not deposited with the receiver in payment for land, that the

Government *by any act of its officials had acted upon*, and I cannot see how the Government can be in any manner liable for its repayment, nor do I think the Government can recover the amount in a suit against the sureties, as it does not arise upon a default to the Government."

Secretary Vilas in Matthewsen and Ward, 6 L. D., 714.

This rule was affirmed, in terms, in E. W. Harris, 8 L. D., 77, where it is said:

"By a payment thus made, the applicant constitutes the receiver his agent to pay the money to the Government if the application is allowed, and if refuted, the receiver is individually liable for repayment and not the Government."

So as late as August, 1896, in Francis J. Dysart, 23 L. D., it is said: "The payment of the purchase price of land to the receiver before the *acceptance* of final proof is at the risk of the purchaser."

This was the regulation of the Department, the rule upon and under which the receiver and entrymen acted and were bound to act, when Smith went out of office December 3, 1889.

Not an entry was ready to be acted on by the local officers, nor was any acted upon until after April 30, 1890. And, therefore, by the action of the executive officers of the Government, the deposits were the property of the entryman and not "public money," and if the office had been abolished December 3, 1889, settlement by Smith with entrymen, severally, without direction or control by the Commissioner, would not only have been regular, but that would have been the only course which could have been pursued.

Smith was not *then* liable to the Government for a dollar of these funds, nor could his securities be for the same reasons.

As said by Receiver Drake (Tr., p. 85), "Up to April 30,

1890, the Government refused to treat these as payments and refused to authorize me to pass on proofs and issue receipts. Only by authority of Letter M was it that these receipts issued which came in that class" (Tr., p. 86). "The Government refused to take these as payments up to the time I received Letter M." "I could not pass the proofs until I had received the money from some source to pass them. The business of the office was blocked so far as these proofs were concerned."

Clearly these moneys were not received by Smith as "public moneys," but under the existing regulations as agent of the entryman, and if the office had been abolished, or suit brought against these sureties before April 30, 1890, *or if Letter M had never been written*, no claim would have been or could have been made against Smith for these moneys.

This is clear, outside of Letter M, which expressly concedes the claim in this brief, so far, and announces a *new* rule.

III.

BUT, A NEW RULE OR REGULATION IN A DEPARTMENT CANNOT CREATE A LIABILITY ON THE PART OF A SUBORDINATE, WHERE NONE EXISTED, AS TO PAST TRANSACTIONS, AND ESPECIALLY AS TO ONE NO LONGER IN OFFICE.

Letter M established a *new* rule.

It says: "The decision of the office has heretofore been against the allowance of an entry where the money be payable to the receiver of public moneys, if the money were not properly accounted for, or deposited to the credit of the United States," and "reluctant as I am to change the former practices, I feel myself compelled to do so in this case," and he proceeds to do so in that letter.

Now, conceding that the Commissioner has power to make all needful rules and regulations as to the disposal of the public lands, not in conflict with existing law, his rules

and regulations so made, are binding only *when* made, and upon subjects and objects upon which they *can* operate.

The regulations and decisions upon the subject in hand, adopted and made before April 30, 1890, were just as operative and binding when in force, as those made after that date, and were the standards fixing rights and liabilities, up to April 30, 1890; and while Letter M would be valid as to *future* transactions, and perhaps as to past, if Smith had remained in office and had the deposits in hand at the date of the new order, this would follow only because the Department had adopted the rule for the first time (and intended that the Government should be bound by it), that deposit by the entryman was, *de facto* and *de jure*, payment for the land.

Confessedly, by Letter M, this was never the rule before, and "*reluctantly*" changed in this case.

The letter could only operate upon pending cases to the effect of relieving the citizen from the burden of a second deposit.

Smith was out of office long before; the money he had, except what Christy secured and repaid, was squandered and Smith insolvent, and therefore there was nothing upon which the order could operate except the *res* which the Government controlled, and such as should afterwards come to the hands of its officers.

Surely, the method of business and the status of the citizen, as well as the relation of the officers, all were different *after* Letter M, than before. The difference is plain: *Before*, deposit was only deposit pure and simple, at the risk of the citizen; the money *his* money until final receipt, and not "public money." After Letter M, deposit was *de facto* payment, and the risk taken by the Government.

Before Letter M, the Government had no concern with the money until final receipt; after this, it had all the con-

cern and all the risk, and therefore the Commissioner could not, by the adoption of a new rule entirely changing the relation of the Government toward a fund, create a liability as to past transactions, and especially when the custodian was out of office, where no liability at all existed when the transactions were closed, or the official relation ceased to exist.

Drake was bound by the new order; Smith was not, of course.

The theory of the court below was that the Government had, by Letter M, accepted the deposit as payment, and has, upon these "payments" to Smith, issued final receipts. (Tr., p. 49.)

The error in this is that the Government did not accept the deposits as payment when made to Smith; never.

The Government then, and during all Smith's incumbency, regarded them as *merely deposits*, at the citizen's risk, and not as payments at all.

The only legal effect of Letter M was to so change existing rules, that upon equitable grounds, to relieve the entryman from a second deposit, cases might be passed, upon the showing that the deposit had been made with Smith, and the entries allowed not because of *payment*, as *payment*, but "Allowed by Letter M, of April 30."

It is not a case of whether the rules and regulations in force at the date of an official bond of a receiver of public moneys, become so much a part of the contract, that they may not be subsequently changed, without consent of the sureties.

I concede this may be done, and that any change in the regulations may be made, not in conflict with existing law, *so long as the principal remains in office;* but at the termination of his term, his liability, and that of his sureties, is

fixed by the regulations in force during his term, and the new regulations affect only future transactions and such property as is under direct official control at the time.

The hardship of the rule contended for below, is well illustrated in this case.

Mr. Christy had secured $25,000 in cash of these deposits from Smith, "to protect the bondsmen."

The agent of the Department, who came out and took possession of the office and assets of the Government late in November, 1889, told Mr. Christy, after full knowledge, that "Smith's accounts with the Government were all straight, and that he didn't owe the Government a dollar," and this was true under the law and the regulations then in force.

Mr. Christy paid out this $25,000 on that assurance before April 30, 1890. Now, it is apparently sincerely insisted that although while Mr. Christy had the money for the protection of appellants, and the Government was not only in fact not making any claim to any part of it, and could not, under its regulations and department decisions, yet after the securities had paid out this money on equitable as well as legal grounds to the original depositors, and because of a new rule, established reluctantly, months afterwards, a new liability to repay all this money was created, and a recovery on this bond is possible in such case.

This was held below, but as is confidently submitted, on erroneous grounds, and we ask a reversal of the judgment appealed from.

Respectfully submitted,

L. E. Payson,
Attorney for Appellants.

W. H. Barnes,
Of Counsel.

No. 212

Brief of Plaintiffs in Error

Filed April 19, 1898

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

Frederick W. Smith, Herbert H. Dixon, Samuel Franklin, et al., plaintiffs in error,
v.
The United States.
No. 212.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

FREDERICK W. SMITH, HERBERT H. Logan, Samuel Franklin, et al., plaintiffs in error,
v.
THE UNITED STATES.
No. 212.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Frederick W. Smith was duly appointed and commissioned as receiver of public moneys at Tucson, Ariz., on February 28, 1887, and on April 11, 1887, he accepted said office and entered upon its duties, having given bond in the penal sum of $10,000, as prescribed in section 2236 of the Revised Statutes. Subsequently a further bond in the penal sum of $30,000 was executed by him and

his sureties, and delivered to the United States on March 7, 1888. This suit is brought for a breach of the latter bond.

The condition of the bond in suit is that the said Frederick W. Smith having been appointed receiver of public moneys, etc., and accepted said appointment, if he "shall at all times during his holding and remaining in said office carefully discharge the duties thereof, and faithfully disburse all public moneys and honestly account without fraud or delay for the same and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue." (Rec., p. 18.)

The breach of the bond alleged was the neglect and refusal of Smith and his sureties to pay into the Treasury of the United States a balance of $25,468.96, received by him as receiver of public moneys, for the use of the United States, which balance, the complaint alleged, was shown to be due the United States by his account as such receiver, adjusted on the 11th day of April, 1890, by the proper accounting officers of the United States.

Judgment was asked for this sum, with interest at the rate of 6 per cent per annum, from the 11th of April, 1890, and costs. Smith, the principal of the bond, was not served with process, and did not oppose a defense.

To this declaration the defendants in the district court filed a demurrer, and also a general traverse (Rec., 9) and other pleas setting up the following defenses:

1. That a prior official bond, with other sureties, had been given by Smith under his appointment as receiver.

2. That the conditions of the bond set out in the complaint are variant and largely in excess of the bonds prescribed by section 2236, Revised Statutes, and that the bond was extorted by the Secretary of the Interior from Smith and his sureties by threats of removal from office.

3. That on or about November 1, 1889, Smith was removed from office as receiver of public moneys, and thereupon his accounts were adjusted by the proper accounting officer, and nothing was found due the United States.

4. That the items making up the balance sued for were illegally and unlawfully charged to Smith in that they were made up, not from the records and books of his (Smith's) office, but upon *ex parte* affidavits of persons who claimed to have paid moneys to him as receiver for the purpose of making entries of public lands.

5. That the sureties had in their possession at the time Smith's accounts were adjusted in November, 1889, the sum of $25,000, money and property belonging to him, out of which they could have paid the United States the amount now claimed, but that being then informed by the proper officers there was nothing due from him as receiver of public moneys, and relying upon that information, they paid out said sum of money to divers persons at the request of Smith, and that at the time of the commencement of this action Smith was insolvent, etc.

6. That when the balance sued for was ascertained, they, the sureties, requested the United States to retain in its possession the sum of about $1,700, the property of Smith, then in its possession and control, and to apply

the same on any of his indebtedness to the United States due from him, which the United States refused to do.

On these pleadings and the evidence, as appears in the statement of facts proven, and admitted by the defendants, the jury rendered a verdict for the United States in the sum of $5,934.96, and judgment thereon was entered in that sum and for $637.89 costs on February 18, 1891.

This judgment was affirmed on appeal by the supreme court of the Territory of Arizona, and modified by allowing interest on said sum of $5,934.96 from February 18, 1891, until paid; and the case is now here on writ of error.

The record is made as for an appeal, although there was a trial by jury, and it does not appear to be made as prescribed in section 2 of the act of April 7, 1874 (18 Stat., 27). But if the case can be disposed of on the merits, no objection is made to the form of the record.

ARGUMENT.

It is altogether unnecessary in this case to discuss the assignment of errors. It is shown by the statement of facts in the record, and is expressly admitted in the brief and argument for plaintiffs in error, that Smith during his term of office received, as receiver of public moneys at Tucson, Ariz., from people who had come before him to make entries of public lands the sum of $40,000, in payment for the lands to be entered by them, before the register of the land office had allowed the entries and given his certificate therefor. For this money Smith wholly failed and refused to account to the United States.

It is argued for the plaintiffs in error—and upon this proposition they rest their case—that the money so received was not public money of the United States, because of certain decisions of the General Land Office and the Secretary of the Interior to the effect that money so deposited with a receiver of public moneys, and not accounted for to the Government, is a matter between the depositor and the receiver, and several Land Office decisions to this effect are cited in the brief for plaintiffs in error. For example, Secretary Vilas, affirming the decision of the Commissioner of the General Land Office, held, it is said, in the case of Matthiessen and Ward (6 Land Decisions, p. 714), that—

> Moneys are not payable to receivers of public moneys until an entry has been allowed by the register and a certificate given. If moneys fall into the hands of a receiver, or are sent to him to be afterwards applied to an entry, they are not moneys lawfully paid to the receiver for which the United States is responsible, but are simply individual deposits and are in the nature of a personal trust; such moneys are not received finally because not authorized to be received; they can be received by the register only in his personal capacity as a private individual, and recourse must be had for such deposits against him personally by the parties aggrieved. * * *
>
> A payment received by the local land offices in advance of the time when they are ready to act upon an application and allow the entry is not in pursuance of any duty enjoined by law, and a failure to account for such sum, in the event that the application is refused, is not a default as to any obligation due to the Government, and the sureties would not be liable therefor.

This decision was rendered in a case where Matthiessen and Ward had paid to the receiver of the Eureka land office in Nevada the purchase money of a tract of public land at the time they made an application to enter it. After this payment the application had been refused by the Interior Department. The receiver had then gone out of office, and had not paid back the purchase money to the applicants for entry of the land. His accounts as receiver had not yet been settled, and they simply asked that they be not passed until the money so paid to him be returned to them, or that the bondsmen be held liable for the amount.

Whatever may be said as to the law of this decision, the gross wrong and injustice of the case is manifest. No statute is cited in support of this opinion, and the only decision of a court referred to by the learned Secretary, as bearing on the case, is that of *Potter* v. *United States* (107 U. S., 126), which, it is submitted, announces precisely the contrary doctrine. In that case it was contended that the moneys were paid by preemption claimants to the receiver before there was joint action by the receiver and register allowing the entry claims under the preemption laws, and therefore that the payments made to the receiver were unofficial payments, for which his sureties were not liable. On this point Mr. Justice Woods, delivering the opinion of the court, said:

> In our judgment, this contention has no ground to stand on. There is no expression in the statute which requires the register and receiver to sit at the same time and concurrently pass upon the sufficiency of the proof of settlement and improvement

by preemptors. If the proof is submitted to the register on one day and he is satisfied, there is nothing in the statute which implies that it may not be lawfully submitted, at some subsequent day, to the receiver for his approval. The oath of the preemptor, which is part of the proof required by law, may be taken before either the register or receiver. (Sec. 2262. *Lytle* v. *State of Arkansas*, 9 How., 314.) They are nowhere required to meet and jointly consider the sufficiency of the proof offered. If both are satisfied, that is all the law requires.

* * * * *

If such proof had been made to the satisfaction of Brashear [the register], all that was necessary to complete the right of the preemptor to an entry of the land was the approval of Potter [the receiver], *which was effectually expressed by his receipt of the money.*

The words we have above italicized are decisive as to the character of the moneys paid to the receiver in the case at bar. By receiving the money, either before or after the register had decided on the preemption claim, or other forms of entry for purchase, the receiver, Smith, had "effectually expressed" his approval of the preemption or purchase of the public land desired to be entered. Smith having received this money in the execution of his official statutory functions, the money so received must be regarded, beyond all question and cavil, as public money of the United States.

Payment to the receiver of public moneys of the price of the land desired to be entered, is one of the steps in the proceedings which constitute an entry of the land, and, as we have seen, a valid payment may be made to

the officer by the entryman at any time when he is making the proof on which the entry is to be allowed. Mr. Justice Bradley, delivering the opinion of the court in *Wirth* v. *Branson* (98 U. S., 118, 121), said:

> The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void unless the first location or entry be vacated and set aside.
>
> This was laid down as a principle in the case of *Lytle et al.* v. *The State of Arkansas et al.* (9 How., 314), and has ever since been adhered to. (See *Stark* v. *Starrs*, 6 Wall., 402.) Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent, such as the payment of the price, the payment of the fees of surveying, or the like.

When the receiver neglects or refuses to pay over to the United States the money paid to him by the entryman, it is "a breach of the condition of his official bond, both as respects himself and the sureties in the bond, and the United States is under no necessity to proceed against the principal in the bond by an action on the case for money had and received." (*United States* v. *Babbitt*, 95 U. S., 334.)

In the *Yosemite Valley Case* (15 Wall., 91) the right of a preemptioner to pay the purchase money of land de-

sired to be entered before the register allows the entry is distinctly declared. Mr. Justice Field, stating the opinion of the court in that case, said, quoting from the opinion in *Lytle* v. *The State of Arkansas* (18 How., 43):

> It is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the neglect or misconduct of a public officer, the law will protect him. In this case the preemption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And, subsequently, when he paid the money to the receiver, under subsequent acts, he could do nothing more than to offer to enter the land, which the register would not permit him to do. * * *
>
> There is no question about the correctness of the doctrine here announced.

It would be frivolous, in view of these decisions, to attempt to argue that the register must first act upon the application for entry before the receiver receives the money tendered by the preemptor or purchaser.

As to the decision of the Interior Department, cited in the brief for plaintiffs in error, it is only necessary to say that in respect to the question of what constitutes public moneys in the hands of a receiver,—it is not convincing; and that such rulings have never any force or effect when, in addition to being grossly unjust to private citizens, they are manifestly in conflict with the decisions of this court. The effect of the departmental decisions cited in the brief of the plaintiffs in error would be to

put a premium upon official swindling. Under such decisions no one but a lawyer familiar with Land Office practice could enter a land office to make title to public land and pay therefor, without risk of being defrauded by the very official who holds himself out to the public as the officer who is alone entitled to receive such moneys. The public-land laws were made for the benefit of poor and industrious men, who are not familiar with the practice and decisions of the Land Department of the Government; and certainly Congress did not intend that these laws should be administered contrary to the rules of common honesty and common sense.

The people who settle on our public domain with the intention of obtaining title to a legal subdivision thereof from the Government are not supposed to be versed in hair-splitting refinements and technicalities. When entrymen come before the local land office and pay over the price of the lands they desire to enter, it is not to be expected that they must decide, at their peril, whether the officer receives the money in his "official capacity," or whether such payments "are simply individual deposits in the nature of a personal trust;" whether in one case the title to the money vests in the United States, or, in the other case, whether the receiver takes the legal title to it as trustee for the entryman.

In *Lytle* v. *The State of Arkansas*, *supra*, the court says:

> The adventurous pioneer, who is found in advance of all settlements, encounters many hardships. * * * He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to

exceed 160 acres. That this is the national feeling is shown in the course of legislation for many years.

Is it to be supposed for a moment that when one of these pioneers hands over to the receiver the purchase price of a quarter section of land, in the process of proving an entry thereof, such a payment is not valid in every respect? Look at the time and place of the transaction. The time is that of proceeding to prove right of entry; the place, a building with the sign over the door, "United States Receiver of Public Moneys;" within, that officer himself; at hand, a safe for the keeping of the public money; and spread upon the wall, letters patent, granted by the President of the United States, signed and sealed by the Secretary of the Interior, which are to the following effect:

> *To all to whom these presents shall come, greeting:*
>
> Know ye, that reposing special trust and confidence in the integrity, diligence, and discretion of [in this case Frederick W. Smith], I have nominated, and by and with the advice and consent of the Senate, do appoint him to be Receiver of Public Moneys. * * *
>
> And I do authorize and empower him to execute and fulfill the duties of that office according to law, and to have and to hold the said office, with all the rights and emoluments thereunto legally appertaining. * * *

Notwithstanding this certificate of the Government to the "integrity," "diligence," and "discretion" of this "receiver of public moneys," it is argued that the entryman must *beware* how he intrusts money tendered for the purchase of public lands into the hands of the *specially trusted* receiver of public moneys. This argument would

be unworthy of answer were it not that our distinguished opponent is himself an authority upon nearly all questions relating to the public lands of the United States.

The very question here presented was recently decided by the circuit court of appeals for the sixth circuit in *Meads et al.* v. *The United States* (81 Fed. Rep., 684). An elaborate opinion was delivered in that case by the Hon. Charles D. Clark, district judge, and well supported by decisions of the highest authority, in which it is held that moneys paid into the hands of a receiver of public moneys by an entryman before it was payable under a rule of the Interior Department, is public money for which the receiver is liable under his bond.

The Government is the party injured in this suit. The sum of $40,000 was received by Smith in his official capacity in payment for entries of public lands, and it is admitted in the brief for plaintiffs in error (p. 3) that no part of this sum has been paid into the Treasury of the United States. Nor does it appear that a single entry for which any of this money was paid to him, has not been allowed by the register of the land office. Unquestionably the payments so made were valid payments to the United States, and they are now admitted as such, under a more enlightened ruling by the General Land Office as to "payments to the Government." (Rec., p. 146, Exhibit A.)

It appears that at the time Smith was removed from office he had in his possession about $25,000 of the above-mentioned $40,000; that he was then insolvent; that he turned this sum of public money over to Mr. Christy, one of the sureties on his official bond; that

this surety, acting for the other sureties, made an offer to one Harlan (an officer of the Government who had been sent out by the Interior Department to take charge of the receiver's office) to settle Smith's accounts and pay any balance due from Smith to the United States out of the said $25,000, and that Harlan then said there was no balance due. It is alleged in the brief for plaintiffs in error that Christy then refunded this amount to the entrymen who had made payments to Smith until the sum was exhausted. There is no satisfactory evidence in the record that this sum was so refunded. But it is not material whether it was or not, nor what Mr. Harlan or any other Government official said or did. The whole $40,000 was public money, and the payment of any part of it to Smith's creditors, or supposed, creditors, was a criminal misappropriation of public moneys, participated in by everyone of the plaintiffs in error in this suit. (See Rev. Stat., secs. 3617, 3619, 3632, 3639, 5490, 5497.)

As counsel for plaintiffs in error has abandoned all technical objections made in the assignment of errors, and confines his argument to the question as to what constitutes public moneys of the United States, we might properly close the brief for the defendant in error at this point, as it is manifest that if any party in this suit has been injured by the judgment it is the Government and not the plaintiffs in error.

It may be well, however, to notice the ninth assignment (Rec., 160), which objects to the Treasury transcripts as not being competent evidence to prove the balance therein stated. It appears in the record (p. 36),

that the transcript was duly certified under the statute as "a transcript of the books and proceedings of the Treasury Department." If the plaintiffs in error desired this court to pass on this objection, they should have set out the transcript in their bill of exceptions. (*United States* v. *Stone*, 106 U. S., 525, 527.) But this is not now a material question, because on the same page of the record there is an agreement of counsel that the district attorney, Mr. Jeffords, might, instead of calling witnesses to prove that they had paid money to Smith as receiver, introduce such secondary evidence as might be found in "the transcripts or indorsements or memoranda or books in the register's office." Besides this, as already stated, it is admitted by counsel for the plaintiffs in error that Smith received about $40,000 from entry-claimants in payment for public lands, and that he turned over no part of that sum to the United States. Therefore, the only real question in the case is that discussed in the brief for plaintiffs in error, to wit, Was the money so paid to the receiver public moneys of the United States?

As to the validity of the strengthening bond with the penalty of $30,000, section 3639 of the Revised Statutes settles that point beyond any question, as does also section 3624 in respect to the interest allowed on this judgment, the only error being that it should have been allowed "from the time of receiving the money."

JOHN K. RICHARDS,
Solicitor-General.

FELIX BRANNIGAN,
Assistant Attorney.

SMITH *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 212. Submitted April 20, 1898. — Decided May 9, 1898.

When an entryman goes to the public land office for the purpose of obtaining public land, and is told by the receiver that his proofs cannot be filed or accepted unless and until he pays the purchase price of the land, which he thereupon does, he makes such payment to the receiver as a public officer of the United States, and not to him as the agent of the entryman, and the payment is to be regarded as one made to the Government and as public money, within the meaning of the law and of any bond given for the faithful discharge of the duties of his office by the receiver, and for his honestly accounting for all public funds and property coming into his hands.

THIS action was brought against Frederick W. Smith and the sureties on his official bond as receiver of public moneys in the Tucson land district in the Territory of Arizona. The bond was dated March 7, 1888, and the condition therein was that "if the said Frederick W. Smith shall, at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for

the same and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise, to remain in full force and virtue."

Smith was appointed receiver on the 28th of February, 1887, and remained such receiver until the latter part of November, 1889, when he was removed and Charles R. Drake was appointed his successor, who assumed the duties of the office and took charge of the books and papers on December 3, 1889. The Government claimed that the condition of the bond had been violated by the failure of Smith to faithfully disburse all public moneys and to honestly account for the same, and that he was indebted to the Government by reason thereof in various sums, amounting to over $19,000. During the time of Smith's incumbency there was either no register of the land office in the Tucson district, or the person occupying that position was in such ill health as to be unable to attend to the duties of the office. Smith was himself also in ill health during 1889. Owing to these facts the business of the office ran largely behind, and there were so many persons presenting their proofs and making their payments to Receiver Smith, before he was ready to pass upon the sufficiency of such proofs and before the register had acted upon any of them, that a large sum of money thereby accumulated in the hands of the receiver, amounting at the time he was removed from office to about the sum of $40,000. Prior to the time when the receiver was removed from office in November, 1889, no final action had been taken by him or the register in regard to any of the applications involved in this record.

Before his removal it had been the custom of the Land Department not to permit the giving of any receipt by a receiver, for money paid him by an applicant for entry, until such application had been finally acted upon by the receiver and the register, and then, if favorably decided, the custom was for the receiver to charge himself in his account with the Government with the amount of the money which had already been paid him by the applicant. If the application were not favorably acted upon, it was then the custom of a receiver to

return the money to the applicant. This was authorized by the Government.

An agent of the Government came to Tucson after the receiver's removal and on examining his books stated that the receiver did not owe the Government anything. One of the sureties on the receiver's bond had heard of the receipt of these moneys by Smith, and had obtained from him $25,000, being part of the moneys which Smith had received as above mentioned. While in possession of this money the surety saw the agent of the Government and inquired if there were any charges against the receiver, his principal, and that he wanted to know so that he might use the money Smith had paid him to repay the Government any amount that might be found due on an accounting, and he was told by the agent that Smith's accounts were all right, and that he did not owe the Government a dollar. It is claimed that thereafter the $25,000 were refunded to the entrymen who had made payments to Smith, until the amount was exhausted.

In April, 1890, there was still a very large accumulation of cases in the Tucson office where proofs had been made and filed with Smith, and moneys had been paid to him, while receiver, as the purchase price of the lands desired and no final receipts had been given by him or his successor. In this condition of affairs the Commissioner of the General Land Office wrote the following letter:

"Letter 'M.'

"DEPARTMENT OF THE INTERIOR,

"GENERAL LAND OFFICE,

"WASHINGTON D.C. *April* 30, 1890.

"Register and Receiver, Tucson, Arizona.

"SIR: I enclose herewith a statement as taken from the records of your office, showing the final proofs now in your office awaiting examination on which the money in payment for the same was paid to Fred. W. Smith, the late receiver, and was by him appropriated to his own use and never accounted for to the United States. You are instructed to examine all the final proofs now in your office, as shown by the accompanying

list, and if the same is found sufficient, you will request the parties in interest to furnish an affidavit, properly attested, showing that they did pay the money to Fred. W. Smith, and whether the same was paid by draft or check. If the parties can furnish certified copies of these drafts or checks from the cashier of the bank showing the same, you will obtain these copies and allow the entries as of date when proof and payment were made. You will refer on the entry papers and upon your records to this letter by initial and date as your authority therefor. The receiver will enter upon the books of his office, under the account of Fred. W. Smith, late receiver, the amount of purchase money received for each class of entry. You will give to said entries a half number corresponding to the time when said proof was accepted and prepare supplemental abstracts of the same, noting thereon, 'Allowed by letter "M" of April 30,' and purchase money is to be charged to Fred. W. Smith, the late receiver. You will then prepare an account current, Form 4–105, thereof and certify therein that the transaction reported appears from the records of your office. The receiver will send a duplicate receipt to the entrymen in accordance with the instructions herein contained, noting on the receipt, as his authority, this letter by initial and date, and after you have carefully examined all of these papers as instructed in this letter, you will forward them to this office for future consideration.

"The decision of this office heretofore has been against the allowance of an entry where the money be payable to the receiver of public moneys if the moneys were not properly accounted for or deposited to the credit of the Treasurer of the United States; but, as a matter of equity, in view of the general circular of this office, which provides that proof without payment must in no case be accepted or received by register and receiver, and in view of the fact that entrymen had made their payments in accord with this circular issued by this office, it is the opinion of this office that the entries should be allowed. I am aware that the views herein expressed are in conflict with the practice above referred to, but my understanding of the law and convictions of equity are so strong and

clear that, reluctant as I am to change the former practices, I feel myself compelled to do so in this case. I therefore hold that the moneys paid by entrymen to Fredrick W. Smith, receiver, and received by him in his official capacity as such, were public moneys within the meaning and intent of the law, and the payment to him was a payment to the Government. The recourse of the United States is under the official bond of Mr. Smith, and, as suit has already been instituted for the recovery of the amount received by him, the entries should be allowed without further delay.

"Very respectfully, WILLIAM STONE,
"*Assistant Commissioner.*"

Pursuant to the directions contained in the above letter, the receiver, Mr. Drake, issued, in all cases where the proofs were satisfactory, final receipts to the various entrymen who had made applications for entry and paid their money to Smith while he was receiver, and the payments to Smith in such cases were recognized as payments to the Government.

Upon the trial of the action in the Arizona court judgment for nearly six thousand dollars was given for the United States for the amount found to be due by the jury in cases where payments had been made to Smith and the final proofs had been favorably decided upon by his successor. That judgment was affirmed by the Supreme Court of the Territory, and the defendants brought the case here for review.

Mr. L. E. Payson and *Mr. W. H. Barnes* for appellants.

Mr. Solicitor General and *Mr. Felix Brannigan* for appellees.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The question to be determined in this case is, whether, under the circumstances above set forth, the moneys received by Receiver Smith, and to recover which the action herein

was commenced, were public moneys within the meaning of the law and the bond given by the receiver.

The moneys paid to the receiver were paid upon the making of proofs by the entrymen under various statutes of the United States providing for the sale of the public lands, such as the statute relating to preëmptions, Rev. Stat. §§ 2257–2288; the statute relating to homesteads, Rev. Stat. §§ 2289–2317; the statute relating to the sale of desert lands. Act of March 3, 1877, c. 107, 19 Stat. 377. In the course of the proceedings under these acts and in the examination of the proofs submitted, various questions of fact arise and are to be decided by the register and receiver, who are to be satisfied of the existence of the necessary facts mentioned in the statute, and of the regularity and sufficiency of the proofs. When so satisfied the register issues his certificate to that effect, and the receiver gives what is known as a "final receipt," and upon the two papers the patent finally issues. There must be the favorable action of both register and receiver before the final papers issue, but such action need not be simultaneous. The receiver may act at one time and the register at another, but both must act before the case is concluded and the papers signed upon which the patent is subsequently issued. *Lytle* v. *Arkansas*, 9 How. 314; *Potter* v. *United States*, 107 U. S. 126.

The statutes are somewhat general in their provisions as to the time of payment of the purchase price of the lands, merely providing that the entries desired may be made upon satisfactory proof being made to the register and receiver and "upon paying to the United States the minimum price of such land."

The statutes do not provide that the entryman shall not pay the money before the final decision is made determining the sufficiency of his proofs, but they simply provide that when the register and receiver are so satisfied and upon payment of the money, entry may be made. The matter of the time of payment, so long as it is made before the entry, is thus left for regulation by the department having the matter in charge. Such regulations are made under § 161 Rev. Stat., permitting each head of a department to prescribe regulations, not incon-

sistent with law, for the government of his department and the conduct of its officers and clerks, etc.

Acting under the authority of section 161, the General Land Office provided by its general circular with regard to the time when payment for public lands sold should be made, and directed "that proofs without payment must in no case be accepted." This regulation did not refer to "final" acceptance of proof, resulting in a favorable decision upon the application. The statutes already provided that it was only *upon payment* that the entry might be made. The regulation referred to the taking of the proofs at all. It could only mean that no proof proffered by an entryman should be received without payment of the purchase price of the land which he desired to purchase. The probable purpose of the rule was to prevent the unnecessary examination of proofs in cases where they might be found to be satisfactory and yet the purchase price should not then be forthcoming. Whatever the reason, the direction was plain and unambiguous, and it absolutely forbade the reception of the proofs of the entryman unless at the same time he paid the purchase price to the receiver for the lands which he proposed to buy. Thus the entryman could not make his proofs and leave them with the receiver for him and the register subsequently to act upon them, unless the entryman at the time of making his proofs and leaving them for future examination and decision paid the purchase price for the lands. This regulation is not inconsistent with or in violation of the statutes in regard to payment. As we have observed, the payment must by statute be made before entry is allowed, but the particular time is not stated. The regulation above mentioned then comes in, the effect of which is to prevent the acceptance of proof without payment, and the payment must therefore be made when the proof is offered, and it may be some time before it is favorably acted upon by both register and receiver. Thus under provision of law and pursuant to valid requirements of the Land Office the entryman is compelled to pay his money at the time he proffers his proofs and before final action upon them is taken by the two public officers designated in the statutes. When the entryman

goes to the public land office for the purpose of obtaining the land he desires, and is told that his proofs cannot be filed or accepted unless and until he pays the purchase price of the land, which he thereupon does, he makes such payment to the receiver as a public officer, acting in the line of his duty, and it is safe to say that the entryman is without any thought or intention of paying the money to such receiver as his own private agent, to be kept by that agent in trust until the proofs are satisfactory, and to be then paid by him to the Government; nor are the circumstances of that nature which would lead to the belief that in making such payment the entryman is in fact trusting to the good faith and integrity of the receiver as his agent and that he does not regard himself as dealing with a public officer of the Government. The law accords with the fact. How can it be said that the money which he pays does not become public money upon such payment, when he pays it pursuant to law as the purchase price of land which he desires to buy and the money is exacted from him by the Government before any final action is taken upon his application? What difference does it make that the Government comes under an obligation to repay the money to the man in case the proofs are not finally accepted? The money is none the less public money when paid to this public official pursuant to law and under the direction and by reason of the regulations of the Land Office. See *King* v. *United States*, 99 U. S. 229.

As the party taking the money is a public officer, and as he exacts the payment, and such exaction is in pursuance of a regulation of the General Land Office, and is consistent with and authorized by law, it seems to us that the money thus paid is received by the receiver as public money and in his official capacity, and he is neither in law nor in fact the agent of the entryman. If the proofs are unsatisfactory and the money is returned, it is returned by the receiver as a public officer and as the agent of the Government, and the money is returned by the Government through its agent.

The custom of the Land Office at the time in question not to have such money appear in the accounts of the receiver

with the Government until after the proofs had been passed upon by both register and receiver and a final receipt given, does not affect the character of the money so paid. The receiver receives the money as a public officer pursuant to the provisions of law. While in the hands of the receiver it remains public money, received by him by virtue of his office, and the money belongs to the Government as between it and the receiver, although it may be under obligations to return the same to the entryman in case his proofs were rejected. When the Government authorized the return of the money by the receiver, in making such return he acted as its agent and not as the agent of the entryman, and the payment was not by the receiver in his personal capacity.

It is true that on some occasions prior to the execution of this bond it had been decided by the Commissioner of the General Land Office that under the law the money paid to a receiver by an entryman before the final determination of his application and a certificate given by the register was not public money, but was paid by the entryman to the receiver as his own agent, and that until the proofs were favorably passed upon and a final receipt given, the money in the hands of the receiver was at the risk of the entryman; it was received by the receiver in his personal capacity as a private individual, and if not properly paid over recourse for the money must be had against the receiver personally by the parties aggrieved. Such was the case of *Matthiessen* v. *Ward*, 6 L. O. Decs. 713. This rule was upheld by the Secretary of the Interior.

The decision does not refer to the regulation made by the department that no proof shall be accepted from the entrymen without payment of the money. This regulation is a most vital part of the whole proceeding, and instead of the moneys not being payable to the receiver until an entry had been allowed by the register and a certificate given, the regulation of the department distinctly provided that payment of the purchase price was to be insisted upon as a condition precedent to the acceptance of proofs at all. The decision of the department was not in any sense a regulation under section

161 of the Revised Statutes, but was the opinion of the Secretary upon the law and regulations as they existed. Such opinion is entitled to and it receives great respect and consideration by this court, but it is not binding upon us as a valid regulation of the department and cannot be so regarded.

We are unable, for the reasons already stated, to concur with the opinion of the Commissioner.

These distinctions between the acts of the receiver as an alleged agent of the entryman in receiving the money prior to the decision upon the sufficiency of the proofs, and the same receiver as agent of the Government in the keeping of public moneys, ought not to be created by any refined reasoning. Fair protection of the entryman in his dealings with the Government ought to be given when possible. There can be no doubt of the fact that the entryman has no idea of any such distinction, nor can there be any doubt of the fact that when he pays the money to the receiver he supposes he is paying it to the Government through its public officer, and by reason of provisions of law and the regulations of the department.

Public money in the sense of the law, and as used in this bond, is money which legally comes to the receiver by virtue of his office and as a public officer and while carrying out the duties of his office, and he cannot be permitted to say that it was not public money when so received. Being public money, he is bound to account.

Is there any alteration of this liability caused by his removal from office before he has finally accounted for the moneys he received on these various applications? We think not. The applications are to be acted upon by the register and receiver; that is, by those persons who at the time of such action hold these offices. It is not a matter personal to the individual who receives the money, and therefore when the person receiving the money is removed from office before the proofs are finally acted upon by the register and receiver, and action is subsequently had by the receiver's successor in office, and the proofs are finally accepted by such successor and by the register, the Government is as much bound by such acceptance as if it had been acknowledged by the receiver who

received the money, and his obligation to account for the money which he received still remains in full force and is not altered in the slightest degree by the fact of his removal from office. As the agent of the Government he received it, and upon the acceptance of the proofs and final receipt it becomes the duty of the Government to issue the patent, and the fact that its agent had not paid the money over to it would constitute no defence to its obligation to issue the patent when the proofs were found satisfactory.

There may have been no breach of the bond at the time of his removal from office, but the liability of the receiver to account remained, and the bond continued in force until he had fully accounted and thus had fulfilled all the conditions of his bond. His repayment to the entryman, after his removal, in case the proof were rejected, would be an accounting *pro tanto* to the Government, the repayment being authorized and recognized by it as the fulfilment to that extent of the duty of the Government to make such repayment.

In this view the liability of the defendant and his sureties does not depend at all upon the letter written by the Commissioner and set forth in the above statement of facts. The letter simply officially recognized the duty of the receiver who then occupied the office to issue the final receipt when the officials were satisfied with the proofs and the money had been theretofore paid to Smith. Although before the writing of the letter the Land Office had not recognized its obligation to issue patents under the circumstances developed in this case and had refused to issue them unless it were again paid the money, that practice, as we have said, did not alter the law and did not take away or affect the obligation and liability of the Government to issue the patent when the proofs were found satisfactory.

Setting the letter aside, the liability of the Government remains the same, the character of the money received by the receiver remains the same, and the liability of himself and his sureties is of the same nature and of the same degree without the letter as with it. This, therefore, is no case of an alteration of the law or of the obligations of the bond made subse-

quently to the time of its execution, and we are not called upon to discuss the question as to how far alterations of the regulations or of the law may affect the continued obligation of the obligors in a bond like this.

Substantially the same question that we have been discussing arose in the case of *Meads* v. *United States*, decided in the Circuit Court of Appeals, Sixth Circuit, in July, 1897, and reported in 54 U. S. App. 150; also in 81 Fed. Rep. 684. The case was heard before Circuit Judges Taft and Lurton, and District Judge Clark, and conclusion arrived at in that case is in accord with that which we have come to herein.

There is no question of estoppel in the case. The surety had possession of some $25,000 of the moneys collected by the receiver, and when the agent of the Government said that the receiver did not owe it a dollar, the surety repaid to the various entrymen the amounts that they had paid, as far as the money went. In doing so, he lessened by that amount the liability of the sureties on the bond, and there is no proof that any portion of the indebtedness for which this judgment was recovered was represented in those payments.

We think this case was correctly decided, and the judgment is, therefore,

Affirmed.